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REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

United States Supreme Court

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 94.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1876.

REPORTED BY

WILLIAM T. OTTO.

VOL. IV.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1877.

Entered according to Act of Congress, in the year 1877. by
LITTLE, BROWN, AND COMPANY,
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Cambridge:
Press of John Wilson & Son.

REPRINTED IN TAIWAN

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD.	HON. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. DAVID DAVIS.
HON. STEPHEN J. FIELD.	HON. WILLIAM STRONG.
HON. JOSEPH P. BRADLEY.	HON. WARD HUNT.

ATTORNEY-GENERAL.

HON. ALPHONSO TAFT.
* HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

* Commissioned March 12, 1877.

ALLOTMENT ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1, 1874, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Jan. 12. PRESIDENT BUCHANAN.
	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	Dec. 11. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	Feb. 18. PRESIDENT GRANT.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	Jan. 24. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	Dec. 8. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, & NEBRASKA.	July 16. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

MEMORANDA.

Mr. JUSTICE DAVIS resigned his seat on the Bench, to take effect March 4, 1877. He took no part in the decision of the cases reported in this volume after that of *Fuller* v. *Yentzer*, p. 299.

The following correspondence took place between him and his associates: —

WASHINGTON, D. C., March 5, 1877.

MY DEAR BRETHREN, — My official connection with the Supreme Court of the United States closes to-day.

Having passed all the years of my active life at the Bar or on the Bench, it is not without serious misgivings that I enter upon a new sphere of public service; but I have not felt at liberty to decline a seat in the Senate, with which I have been honored by the General Assembly of the State of Illinois.

In severing the relations which have existed between us for so many years, I beg leave to bear my testimony to the eminent learning, ability, and integrity which have characterized your judicial labors. From the organization of the Government, the Supreme Court has been composed of able and upright judges. In my judgment, it is now as worthy of the confidence of the American people as it ever has been at any period of its history. Since I was invited to its councils by President Lincoln, six of its members have been numbered with the dead. I take great satisfaction in the reflection that my relations with them, and all my associates, have been uniformly kind and cordial.

In offering you my parting salutations, I beg you to be assured of the respect and sincere good wishes with which I remain your friend and servant,

DAVID DAVIS.

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES,
March 10, 1877.

DEAR BROTHER DAVIS, — We have received with sincere regret your letter announcing that your official connection with us is closed. During

the fifteen years in which you have been a member of this court, questions of the gravest character have come before it for adjudication, and you have borne your full share of the labor and responsibility which their decision involved. We shall miss in the conference-room your wise judgment and your just appreciation of facts; and in the reception-room, your kind and courteous greetings.

With the hope that your life in the future may be as useful as it has been in the past, and that the ties of personal friendship which now bind us so closely to you may never be broken, we subscribe ourselves, very sincerely, your friends,

M. R. WAITE,	STEPHEN J. FIELD,
NATHAN CLIFFORD,	W. STRONG,
N. H. SWAYNE,	JOSEPH P. BRADLEY,
SAMUEL F. MILLER,	WARD HUNT.

The Hon. DAVID DAVIS.

Pursuant to notice, a meeting of the members of the Bar of the Supreme Court of the United States, with reference to the resignation of Mr. JUSTICE DAVIS, was held in the court-room, March 17, 1877.

The meeting was called to order by Hon. MATTHEW H. CARPENTER, and on his motion Hon. WILLIAM M. EVARTS was appointed Chairman, and DANIEL W. MIDDLETON, Esq., Secretary.

On motion of Mr. CARPENTER, the Chairman appointed the following gentlemen: Mr. MATTHEW H. CARPENTER, Mr. GEORGE H. WILLIAMS, Mr. SAMUEL F. PHILLIPS, Mr. RICHARD T. MERRICK, Mr. J. HUBLEY ASHTON, Mr. JOSEPH CASEY, and Mr. WALTER Q. GRESHAM, a committee to draft resolutions appropriate to the occasion.

The committee reported the following resolutions: —

Resolved, That the members of the Bar of the Supreme Court of the United States have received with deep regret the intelligence of the resignation of Mr. JUSTICE DAVIS.

Resolved, That they desire to record their high sense of the learning, the ability, the love of justice, and the fearless independence which that eminent magistrate brought to the discharge of his judicial duties, and their grateful appreciation of the courtesy which he habitually extended to them.

Resolved, That the chairman of the meeting be requested to communicate these resolutions to JUDGE DAVIS, and that the Attorney-General be requested to present them to the Court, and ask that they may be entered upon its minutes.

The resolutions were thereupon unanimously adopted, and the meeting adjourned.

On the 19th of that month, Mr. ATTORNEY-GENERAL DEVENS addressed the Court as follows:—

May it please the Court:—

I ask but a single moment's delay in the business of the Court, that I may, on behalf of the Bar, present certain resolutions, expressive of their respect for the Hon. DAVID DAVIS, late an associate justice, and of their regret at his retirement from the duties of the high office which he has so long and so ably filled.

If these resolutions shall in any way be found obnoxious to just criticism, it will be because they err on the side of too much repression. The Bar have preferred this, rather than it should be said that there has been any exaggeration in their expressions of respect for him, or of regret for his departure to other fields of labor and duty. They are quite well aware that the time for the full consideration of his many claims upon their respect and gratitude, and for his just eulogy, has not arrived; and they fervently hope that the hour for this may be long postponed. But they are unwilling to part from him in the chamber where he has so long listened with patience and decided with justice, without an assurance on their part that they appreciate his industry, fidelity, and ability in the many harassing, grave, and important matters which were passed upon by this Court while he was one of its justices.

His opinions in the published volumes of the reports which have followed the time of his appointment are an enduring monument to his reputation. To discharge the duties of a magistrate of this Court to the considerate acceptance of those who conduct the controversies before it is no easy task. The fame which is embodied only in our somewhat shabby sheep-skin volumes seems but a dusty immortality. There is nothing in these calm, closely reasoned judgments to please the ear like the triumphs of eloquence in the halls of debate, or delight the eye like the victories of martial glory. Little read although they may be by the masses of the people, they nevertheless reach every man in his property, his life, and every thing that life holds dear. We would willingly believe that the fame of an upright and able judge is equally honorable and dignified with that which can anywhere be won by faithful public service.

Conscious of the purity and ability of Mr. JUSTICE DAVIS in the great task which he has been heretofore called upon to perform, the Bar have desired to place upon record their sense of obligation to him, and to express their hope that his services in the new field to which he has deemed it his duty to transfer them, may prove equally agreeable to himself and useful to our country.

The Attorney-General then read the resolutions, and moved that they be entered upon the minutes of the Court.

Mr. CHIEF JUSTICE WAITE replied as follows: —

We cheerfully accede to the request of the Bar, and direct that their very appropriate resolutions, as well as the remarks of the Attorney-General in presenting them, be entered upon the minutes. We have already placed on record an expression of our own feelings, upon the occasion which has called forth the resolutions, in a reply to a communication from our late brother announcing that his most agreeable official relations with us were closed.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1876.

WHEELER *v.* SEDGWICK.

An objection of the defendant that the evidence admitted in the court below tended to prove that he was not solely liable to the plaintiff for one of the items of the account sued upon, cannot be made for the first time in this court.

ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action of assumpsit by the defendant in error, assignee in bankruptcy of Frederick S. Comstock and James M. Wheeler, formerly partners engaged in business as stock-brokers under the firm name of F. S. Comstock & Co., against George M. Wheeler, to recover certain moneys claimed to be due on account of stock operations of said firm on his account. The case below turned upon the question whether Comstock & Co. had authority from Wheeler to make certain purchases and sales on his account, and, if not, whether he subsequently ratified them.

Among other items in dispute was an account headed "G. M. W. Chicago and North-western, $6,125.62," which the bankrupt Comstock testified was one-half of a balance due the firm in a transaction in which he and Wheeler were jointly interested. The plaintiff below asked this witness, "What authority, if any, had you from George M. Wheeler

to make purchases and sales of North-western stock in which you and he should be jointly interested?" The defendant objected to this question, and the witness did not answer it. The witness further testified, in answer to other questions, to which no objection was made, that the firm of Comstock & Co. had certain side transactions in North-western stock for and on account of George M. Wheeler, and by his authority; that there was an agreement between witness and defendant, of which witness's partner was ignorant; that, if the account showed a profit, witness would take half of the profit when they closed it up, and, if the account showed a loss, witness would stand one-half of the loss; that those transactions extended to Jan. 31, 1868, and resulted in a loss of $12,251.23, one-half of which was transferred to defendant's individual account, and the other one-half in like manner to witness's account. A witness was thereupon called by the plaintiff, who, without objection, furnished a statement, including the "G. M. W., Chicago and North-western" account, and showing, with interest on the several items, a net balance of $26,458.90, due from the defendant.

After the testimony was closed, the defendant asked the court to direct a verdict for the defendant, on the ground that there was no proof upon which to maintain the action; but the court refused so to direct, and thereupon charged, substantially, that if the jury found that Comstock & Co. had authority from the defendant to buy and sell the stocks referred to in the testimony, or, if they had no such authority, that the purchases and sales were subsequently ratified by the defendant, then the plaintiff was entitled to recover, and that the amount of that recovery should be $26,458.90.

The defendant thereupon excepted to the ruling that the plaintiff was entitled to recover $26,458.90.

The jury found a verdict for that amount in favor of the plaintiff, and judgment was rendered thereon. The defendant thereupon sued out this writ, and assigns for error, among others, the admission in evidence of the account upon which the defendant below and one of the bankrupts were jointly liable, and the including of one-half of the amount thereof in the verdict of the jury.

Argued by *Mr. Thomas M. Wheeler* for the plaintiff in error, and by *Mr. F. N. Bangs, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We find no error in this record. To say the least, there was some evidence before the jury tending to prove the items of the account upon which the suit was brought, and the court, therefore, properly refused to instruct the jury to find for the defendant.

The jury were not instructed that the plaintiff was entitled to recover the amount of $26,458.90 at all events, but only in case all the questions in dispute were found in his favor. That there was no controversy as to the amount of the recovery, if the other questions were settled in favor of the plaintiff, is evident from the fact that a witness was called, who, without objection, furnished the jury a calculation of interest upon the several items of the account as stated. No exception was taken to the charge as given upon the material points in litigation between the parties.

The attention of the court below was not called to the particular objection now taken to the recovery of one-half the amount shown to be due upon the account headed, "G. M. W. Chic. and N. W. account," to wit, that it was a joint account of the defendant and one of the bankrupts, and that the defendant could not be sued upon it alone. This being the case, it is too late to make it now. The exception, as it appears in the record, is "to the ruling that the plaintiff was entitled to recover $26,458.90." If it was desired to exclude the item of $6,125.62 because of the non-joinder of another party originally interested in that part of the account, the point should have been distinctly and specifically made, and an appropriate exception taken upon the record. The evidence to prove this item in the account was not objected to The question put tc the witness Comstock, which was objected to, was not answered.

We see nothing in the exceptions to the rulings of the court upon the admissibility of testimony which requires particular mention, as we are satisfied of their correctness.

Judgment affirmed.

HOADLEY v. SAN FRANCISCO.

1. Under the fifth section of the act of March 3, 1875 (18 Stat. 471), this court has jurisdiction to review an order of a circuit court dismissing a cause, or remanding it to the State court from which it had been removed under the second section of that act.
2. The questions of title involved in this case do not arise under the Constitution or the laws of the United States, or a treaty made under its authority. The Circuit Court did not, therefore, err in remanding it to the State court from which it had been removed.

APPEAL from the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. S. W. Holladay for the plaintiff in error.

Mr. Delos Lake, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This action was commenced by Hoadley, the appellant, a citizen of California, Jan. 5, 1870, in the District Court for the twelfth judicial district of that State, to quiet his title to certain of the pueblo lands of the city of San Francisco, granted to that city by the act of Congress passed July 1, 1864, 13 Stat. 333, sect. 5, of which, so far as it is material for the determination of this cause, is as follows: —

"That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco . . . are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the 11th of March, 1858. . . ."

He claimed as one of the beneficiaries under this grant by the operation of the city ordinances referred to. The question to be determined is whether he was so in fact.

Sect. 2 of the act of March 3, 1875, 18 Stat. 470, is as follows: —

"Any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred

dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . either party may remove said suit to the Circuit Court of the United States for the proper district."

After the passage of this act, Hoadley removed his suit to the Circuit Court of the United States for the District of California, alleging that it was one arising under the Constitution and laws of the United States. In the Circuit Court he amended his bill, setting forth in detail the particulars of his claim to the benefit of the act of Congress through the city ordinances. To this amended bill the city demurred, assigning for cause, among others, that it did not show that the Circuit Court had jurisdiction. Upon the hearing of this demurrer, the court entered an order remanding the cause to the State court, and from that order the present appeal has been taken.

By sect. 5 of the act of March 3, 1875, 18 Stat. 471, it is provided "that the order of the Circuit Court dismissing or remanding the cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." This is a modification of the previous legislation upon this subject, under which we held, in *Insurance Company* v. *Comstock*, 16 Wall. 270, and *Railroad Company* v. *Wiswall*, 23 id. 508, "that the remedy in such a case was by *mandamus* to compel action, and not by writ of error to review what has been done."

We have, therefore, jurisdiction of this appeal, but we are clearly of the opinion that the Circuit Court did not err in remanding the cause. The questions involved did not arise under the laws of the United States, but under the ordinances of the city as ratified by the act of the legislature. The act of Congress operated as a release to the city of all the interest of the United States in the land. The title of the United States was vested in the city. Whether the city took the beneficial interest in the property as well as the legal title depended upon the effect to be given to the act of the legislature and the ordinances, and not upon the act of Congress. The case is precisely the same in principle as it would have been if the city had, previous to the act of Congress, conveyed the land to Hoadley by deed, with covenants of warranty. If

in such a case a controversy should arise between Hoadley and the city as to whether or not the title granted to the city inured to his benefit under the warranty, the question would not be as to the effect of the grant from the United States, but as to that of the conveyance from the city. The case would not arise under the laws of the United States, but under the deed and its covenants. *Decree affirmed.*

PIKE v. EVANS.

1. Although, in Louisiana, informalities which occur in a sheriff's proceeding under execution may, if taken advantage of in due time, be good ground for annulling a sale made by him, yet, if he, being thereunto authorized, sells the land, and executes a deed therefor, to a *bona fide* purchaser, the latter, in an action against him to recover the land, commenced after five years from the time he entered into possession, can set up the statutory prescription.
2. The failure of the sheriff to actually seize the property is cured by the possession of such a purchaser for five years.
3. Under the laws of Louisiana, a deed of property from a person having authority to sell is regarded as a just title for the purpose of prescription.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This is a petitory action brought to recover a certain plantation in Louisiana. The plaintiff (now defendant in error) claimed the land under an act of donation from her uncle, Ackley Perkins, passed the 5th of September, 1861. Perkins had purchased the land at sheriff's sale made Aug. 8, 1861, under a vendor's lien, and gave a twelvemonth's bond for the purchase-money. One Williams, and William S. Pike, the defendant below (now plaintiff in error), were his sureties on this bond. The bond not being paid, a writ of *fieri facias*, under the laws of Louisiana, was issued upon it against the goods and lands both of Perkins and his sureties. The sheriff, under and by virtue of this writ, sold the plantation in question on the 6th of January, 1866; and Pike, to save his own property and to protect himself against his liability as surety, became the purchaser, paid the incumbrance, and went into possession on the day of sale. He had been in possession over five years

when this action was brought; and, amongst other things, pleaded prescription of one, three, and five years.

On the trial of the cause, the plaintiff having proved the act of donation from her uncle, Ackley Perkins, on which she relied, and the previous purchase of the property by him at sheriff's sale in August, 1861, the defendant gave in evidence the twelvemonth's bond executed by Perkins and his sureties for the purchase-money at said sale, the *fieri facias* issued thereon in October, 1865, and the sheriff's deed to him dated Jan. 6, 1866, and introduced evidence tending to show that he, the defendant, had been in possession of the property in question for a period of five years, and that he purchased the property at the sheriff's sale; and thereupon he asked the court to charge, that if the jury found that he had been in possession for a period of five years, and that he purchased the same from any person authorized to sell at public auction, then any informality connected with or growing out of the sale was cured by the lapse of five years. The court gave the instruction asked, but added, "If the sheriff did not seize the property, that is an informality which is not cured by possession for five years." The counsel for the defendant excepted to this modification.

There was a judgment for the plaintiff below, whereupon the defendant sued out this writ of error.

Mr. Thomas J. Durant for the plaintiff in error.

The court below erred in charging the jury as to the effect of the sheriff's failure to seize the property. *Walden* v. *Canfield*, 2 Rob. (La.) 472; *Drouet* v. *Rice*, id. 377; *Leduf* v. *Bailly*, 3 La. Ann. 8; *Brien* v. *Sargent*, 13 id. 198; *Robert* v. *Brown*, 14 id. 598; *Budd* v. *Stenson*, 20 id. 573; *Woods* v. *Lee*, 21 id. 505 *et seq.*; *Pasiana* v. *Powell*, id. 584.

Mr. George W. Paschal, contra.

The omission of the sheriff to actually seize the property rendered the sale absolutely null and void. There was, therefore, no error in the charge of the court below. *Watson* v. *Bondurant*, 21 Wall. 123; *Stockton* v. *Downey*, 6 La. Ann. 581; *Birch* v. *Bates*, 22 id. 198.

In *Morton* v. *Reynolds*, 4 Rob. (La.) 26, it was held that the prescription of five years related to and cured merely irreg-

ularities in the advertisements, time, place, and terms of sale occurring *after* a legal seizure. But informalities could not apply to all manner of nullities. The statute is not curative of such.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

Sundry bills of exception were taken in the course of the trial of this action, but as the one quoted in the preceding statement of the case was, in our view, well taken, and is decisive, it is unnecessary to advert to them further.

By a law of Louisiana, passed March 10, 1834, sect. 4, it was enacted, —

"That all informalities connected with or growing out of any sale made by a parish judge, sheriff, auctioneer, or other public officer, shall, after the lapse of five years from the time of making the same, be prescribed against by those claiming under such sales, whether against minors, married women, or persons interdicted."

This law continued in force until 1870, when it was superseded by a general provision contained in the Revised Statutes of 1870 (sect. 3392, p. 659), and in the Civil Code, as published in that year, art. 3543, the terms of which are as follows: —

"All informalities connected with or growing out of any public sale made by any person authorized to sell at public auction shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

Other articles of the Civil Code of Louisiana on the subject of prescription require that the person who sets it up in relation to an immovable must have acquired the immovable in good faith and by a just title. Thus, art. 3478 declares that "he who acquires an immovable in good faith and by a just title prescribes for it in ten years." Arts. 3484 and 3485 declare that by the term *just title*, in cases of prescription, is not meant that which has been derived from the true owner, but that which has been received from any person whom the possessor honestly believed to be the real owner, provided it were

such as to transfer the ownership of the property; that is, such as by its nature would have been sufficient to transfer the ownership, if it had been derived from the real owner, such as a sale, exchange, legacy, or donation.

The Supreme Court of Louisiana has frequently had occasion to construe the effect of these laws.

In *Walden* v. *Canfield*, 2 Rob. (La.) 468, where prescription was set up under a title based on a marshal's sale, the court said: "The defendants have produced a regular judgment, writ of execution, and a deed of sale from the marshal to their author; and, under the well settled and repeatedly established doctrine of our jurisprudence, that in relation to sales under execution, where a purchaser shows a judgment, writ of execution, and sale, under which he holds, his title will be considered as legal and valid, we think that on this point the defendants have satisfactorily complied with the requisites of the law; and that, as their title being a just one, that is to say, one which of itself was sufficient to transfer the property in dispute, it is such as can legally serve as the basis of the prescription. It is true that the plaintiff has attempted to attack the defendants' original sale on the ground of informality in the other proceedings of the marshal; but this, in our opinion, cannot change, or in any way alter the effect of the defendants' title, if they have really possessed under it, during the time required by law to acquire the property by prescription, before the institution of this suit, or, in other words, before the alleged informalities were set up against the presumed legality and validity of their title."

In *Leduf* v. *Bailly*, 3 La. Ann. 8, the same doctrine was held where the irregularity complained of was that the sheriff's deed did not purport to convey the interest of the party from whom the plaintiffs deduced title. The judgment and execution were against him and others, but the sheriff's deed omitted his name. The defendants holding under this deed pleaded prescription, and the court held it a sufficient title to base prescription upon. "No evidence has been adduced," said the court, "to repel the legal presumption that the defendants' possession commenced in good faith."

So, in *Brien* v. *Sargent*, 13 id. 198, want of due notice of

seizure by the sheriff was held to be no obstacle to prescription being set up by one who claimed under the sheriff's sale; there being no evidence to impeach the defendant's good faith, and he having shown a regular judgment, execution, and sheriff's deed.

The subsequent case of *Robert* v. *Brown*, 14 id. 605, shows what kind of objections to a judicial sale may render it ineffectual as a basis of prescription. There a commission to sell the property of minors was issued without any order of sale. The court held that there was a total want of authority to sell; and that, in such a case, the prescription of five years could not be claimed under the statute, but that it only cured those informalities which may occur in the execution of a decree or other authority to sell. This case is analogous to that which would be presented if a sale were made under an execution without any judgment to support it.

From these authorities (and others to the same effect could be cited) it is evident that although informalities occurring in a sheriff's proceedings under execution may be good ground for annulling a sale made by him if taken advantage of in time, yet that if the sheriff has authority to sell, and does sell, and execute a deed to the purchaser, the latter, if a purchaser in good faith, may set up the prescription of five years under the statute. Applying this rule to the case before us, we think the court erred in holding that, if the sheriff did not actually seize the property, it was such an informality as could not be cured by possession for five years. The case of *Morton* v. *Reynolds*, 4 Rob. (La.) 26, referred to by the defendant in error, which seems to hold that the only informalities cured by five years' possession are those occurring in the advertisement of sale, is overruled by subsequent cases, and is contrary to the general current of decisions made by the Supreme Court of Louisiana. The case of *Watson* v. *Bondurant*, 21 Wall. 123, was very different from the present. In that case the question of prescription did not arise. Bondurant, the mortgagee, procured the property to be sold by the sheriff without any actual seizure or notice to Watson, who was in possession, and bought the same himself, and then brought his action to recover possession. Under those circumstances, it was competent to Wat-

son to take advantage of any informality in the sale; and we held that the want of seizure invalidated it. So, in this case, if the defendant in error had proceeded in due time, the informalities relied on, if existing in point of fact, would probably have been sufficient to invalidate the sale. But that is not the question here. The question here is not whether the plaintiff in error had a good title, but whether he had such a just title as the law of Louisiana requires to lay the foundation of prescription; and of this we think, under the statute, and in view of the authorities cited, there is no doubt. He received a deed from a person who had authority to sell; and that is regarded as just title for the purpose of prescription.

This decision renders it unnecessary to examine the preliminary objections raised by the defendant in error on the question of *supersedeas*. The objection that the bills of exception were signed after the term at which the trial was had is met by the fact that the delay was made by the consent of the parties and the order of the court, and whilst a motion for new trial was pending.

Judgment reversed and record remanded, with directions to award a venire facias de novo.

ATLANTIC AND PACIFIC RAILROAD COMPANY v. HOPKINS.

1. In Kansas, an order of a court in a proceeding in aid of execution directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor is not a judgment, and does not determine finally the liability of the garnishee.
2. Therefore, in such a proceeding, an order of the circuit court of the United States, sitting in that State, awarding execution against a garnishee, is erroneous.

ERROR to the Circuit Court of the United States for the District of Kansas.

On the 30th of November, 1872, Hopkins obtained, in the Circuit Court of the United States for the District of Kansas, a judgment against the St. Louis, Lawrence, and Denver Railroad Company for $6,385, with interest and costs of suit. Upon this judgment two executions were issued, and returned unsatisfied.

The attorney for Hopkins filed in the clerk's office, June 19, 1873, his affidavits, setting forth that he had good reason to and did believe that the Pacific Railroad, and the Atlantic and Pacific Railroad Company, were indebted to the St. Louis, Lawrence, and Denver Railroad Company. Garnishee summons with interrogatories attached were thereupon issued. The companies answered, denying their indebtedness; but the court, on the 4th of December, 1873, having, upon consideration of said answers and the argument of counsel thereon, found that the sum of $7,500 would be due from the garnishees to the defendant on the first day of January then next ensuing, passed the following order: —

"It is, therefore, now by the court here considered, ordered, and adjudged that said garnishees, the Pacific Railroad and the Atlantic and Pacific Railroad Company aforesaid, as garnishees herein, pay into this court, to the clerk thereof, on the first day of January next, so much of said sum of $7,500 as it will require to pay and discharge the judgment heretofore, and on the thirtieth day of November, A.D. 1872, rendered herein in favor of said plaintiff against said defendant, that is, the sum of $6,385, with interest thereon at the rate of seven per cent per annum from the said thirtieth day of November, A.D. 1872, and the costs by said plaintiff in this action expended, and that execution issue therefor if they neglect to make such payment on that first day of January, A.D. 1873; and that on such payment being made herein to said clerk by said garnishees, or either of them, the said garnishees are to both stand and be discharged herefrom without costs against them or either of them; but if they fail to make such payment on said first day of January next, then such execution is to be issued and enforced against said garnishees and their and each of their property, at their costs."

To this order and judgment said garnishees excepted, and sued out this writ of error.

Argued by *Mr. C. E. Bretherton* for the plaintiff in error.

Submitted on printed arguments by *Messrs Clough & Wheat*, for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Supreme Court of Kansas, since the order complained

of in this case was made, has decided that an order in a proceeding in aid of execution, under sect. 490 of the Civil Code of that State, directing a garnishee to pay to the judgment creditor money which he owed the judgment debtor, was not a judgment, and did not determine finally the liability of the garnishee. The language of the opinion is as follows: —

"The making of it [such an order] is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is in effect only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights. And the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action." *Board of Education* v. *Scoville*, 13 Kan. 32.

In a previous case, *Arthur* v. *Hale*, 6 id. 165, it was held to be error to award execution against a garnishee to collect the money in case he failed to make payment according to the order. As the practice in the courts of the United States must conform as near as may be to that in the courts of the State, Rev. Stat., sect. 914, these decisions construing the practice acts of the State are binding upon the courts of the United States. It follows that the Circuit Court erred in directing that execution might issue in this case against the garnishee if payment should not be made according to the order. To that extent the order of the Circuit Court is reversed, but in all other respects affirmed; the defendant in error to pay the costs in this court.

Cause remanded, with directions to modify the order complained of by striking out all that part thereof which directs that execution may issue.

EX PARTE CUTTING.

1. To entitle a petitioner to a writ of *mandamus* to compel a circuit court to allow an appeal from its decree, he must show that he has a clear right to an appeal which has been refused him by that court.
2. *Mandamus* does not lie to compel a circuit court to allow an appeal from its decree by a person not an original party to the suit, unless it appears that his petition to be allowed to intervene was granted, or that he at least acted, or was treated, as a party.
3. An appeal does not lie from an order of the court below, denying a motion in a pending suit, to permit a person to intervene and become a party thereto.

PETITION for a writ of *mandamus* to the Circuit Court of the United States for the Eastern District of Missouri.

George E. Ketcham, on his own behalf and on behalf of all others holding third mortgage bonds of the Pacific Railroad, filed a bill in the Circuit Court of the United States for the Eastern District of Missouri, Nov. 11, 1875, against the Pacific Railroad and certain other defendants, to foreclose a mortgage given to secure the payment of such bonds.

On Jan. 8, 1876, Thomas P. Akers, a stockholder of the Pacific Railroad, filed a motion for leave to come and defend in the action, on the ground that the officers and directors of the company, being themselves interested in the mortgage, did not intend to resist the foreclosure, when, as he alleged, there was a good and valid defence. Feb. 7, by leave of the court, he filed an answer and cross-bill in the cause. At the same time the company filed an answer, substantially admitting the allegations in the bill, but concluding as follows: —

"But, it says, that it is informed that a portion of said stockholders claim that they [the third mortgage bonds] are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same. Therefore, this defendant asks this honorable court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper."

March 10, Ketcham, the complainant, moved the court for an order that the answer and cross-bill of Akers be withdrawn from the files. March 25, Peter Marie, Frank A. Otis, Robert L. Cutting, Jr., James D. W. Cutting, and George R.

Fearing, representing themselves to be stockholders of the company, on leave filed a petition in the cause, stating "that Thomas P. Akers, a stockholder of said company, has filed his answer and cross-bill to the bill of complaint, filed by complainant in this cause, and in said answer and cross-bill avers that he files the same, not only for his own benefit as such stockholder, but for the benefit of all other holders or owners of the shares of said capital stock who may come in and contribute to the cost and expense necessary to the prosecution of the same," and praying "that they may be allowed to come in and defend the said suit and be made co-defendants herein with said Thomas P. Akers, and be joined with him as parties defendant herein, with such other stockholders as may desire to join them as defendants," and "that they may be allowed to adopt the said answer and cross-bill as their answer and cross-bill in this cause, and to join with him in his prayer for relief in the premises."

The record does not show that any action whatever was taken by the court upon this petition after it was filed, or that the parties made any motion in that behalf. It was ordered, April 8, "that the cross-bill of Thomas P. Akers . . . be taken from the files of the court, as the same is found to be defective in form;" "that leave be given to Thomas P. Akers as a stockholder, and the county of St. Louis, claiming to be a stockholder, or trustee for stockholders, to file an amended cross-bill herein within thirty days, upon giving security for costs in the sum of $5,000;" and "that leave be granted to the county of St. Louis to make answer to the bill of foreclosure in this cause, and defend against the same."

April 25, Akers and St. Louis County filed their amended answer and cross-bill pursuant to this leave; but, June 6, they appeared, and by further leave of the court dismissed their cross-bill and withdrew their answer. This being done, the court, on the same day, "being fully advised in the premises, and by consent of the parties to this suit, through their solicitors of record," entered a decree of foreclosure and sale in accordance with the prayer of the bill. Neither Cowdrey nor any one of the present petitioners objected or in any manner interposed against the decree.

Immediately after the decree was entered the court adjourned for the term. On the first day of the next term, Sept. 18, a motion was made to confirm a sale which had been made under the decree, Sept. 6, and which was reported Sept. 15. On the next day, Sept. 19, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, and George R. Fearing, acting "not only for their own benefit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad, who come in and contribute to the cost and expenses necessary for the prosecution of this suit," filed a motion and petition "for liberty to intervene to set aside the decree of June 6, 1876, and sale, and for liberty to demur, answer, plead, or appeal, as advised." In this petition they set forth, among other things, that they, as owners in their own right, and as a committee or agents of others, represented $3,500,000 out of the $7,000,000 or thereabouts of the capital stock of the company; that the decree of June 6 had been improvidently entered; "that at the time or just previous to said order of sale [decree of June 6] being made, the county of St. Louis withdrew its answer to the complaint, and also a cross-bill filed by them, which was pending in this case, without any notice to your orators or to the stockholders of the Pacific Railroad; that also Thomas P. Akers, Esq., had filed an answer and a cross-bill on his own behalf and on behalf of all the other stockholders, which was then pending in this court, and which, upon said sixth day of June, he withdrew, without any notice to the stockholders represented by him;" "that on or about the second day of February, 1876, they authorized N. A. Cowdrey, one of the present petitioners for leave to intervene in this cause, to commence a suit by bill in equity in this court against the Pacific Railroad, the Atlantic and Pacific Railroad Company, Andrew Pierce, . . . C. K. Garrison, . . . and Henry F. Vail and James D. Fisk, to whom the mortgage sought to be foreclosed was made in trust to secure the payment of the bonds, and others, directors in said Pacific Railroad, and directors in said Atlantic and Pacific Railroad Company;" "that said suit is now pending in this court;" and that the bill prays, among other things, "for a

cancellation of the outstanding . . . third mortgage bonds, alleging the same to have been issued in fraud of the rights of the stockholders of the Pacific Railroad."

This petition concludes with a prayer, as follows: —

"Your orators humbly pray the honorable court to take their case into consideration, and, upon finding their allegations and averments to be true, to make an order of this court that your orators may be allowed to intervene as parties defendants in this cause, and they be authorized to make answer, plead, demur, or to appeal, as they by their counsel shall be advised; and that the decree of June 6, 1876, and sale thereunder, be set aside, and for nothing had, or that you will grant such other relief as to equity appertains."

Oct. 3, the following order was made: —

"The motion of said Cowdrey and others, for liberty to intervene to set aside the decree and sale herein, was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, it is ordered by the court that said motion be denied."

The same parties then made a motion for leave to file a petition to intervene in the cause, and that the decree and sale thereunder be set aside and the cause dismissed for want of jurisdiction; and this motion was denied.

Oct. 7, they again appeared, and made "application for an order allowing an appeal to the Supreme Court of the United States from the order of this court in the matter of N. A. Cowdrey and others;" which was also denied.

The suit of Cowdrey, referred to in the petition filed Sept. 19, was commenced Nov. 13, 1875. The appearance of the defendants was entered Dec. 3. The suit was prosecuted by Cowdrey and others, whose names are not disclosed; but, Dec. 6, the complainants moved for leave to strike out the names of Thomas P. Akers and John S. Vogel, as complainants, and to discontinue the suit as to them. This motion was granted Dec. 11. Jan. 7, an amended bill was filed by leave of the court, to which answers were filed by some of the defendants, Feb. 5. A second amended bill was filed Feb. 7; to which answers were filed by some of the defendants, and demurrers by others, Feb. 7, March 11, March 20, and, by leave,

Sept. 13. No motions or other proceedings were ever had in the case, nor any matters therein set down for hearing or testimony taken.

Upon this state of facts the petitioners now ask that a writ of *mandamus* may issue from this court to the judges of the Circuit Court, "commanding them, or one of them, to grant your petitioners an appeal to this court from the decrees of that court in said cause, and to accept bond to act as a *supersedeas*, and that such appeal be allowed as of the date when said application was made originally in said court, or when it was rejected, as this court shall order."

Mr. Henry Crawford for the petitioners.

Cutting, Marie, and other stockholders, having, by leave of the court, upon March 25, 1876, made themselves co-defendants with Akers, and joined with him in his answer and cross-bill, became real and substantial parties to the suit. *Bronson* v. *La Crosse Railroad Co.*, 2 Wall. 283; *Railroad Company* v. *Bradleys*, 7 id. 575; *Peck* v. *N. Y. & L. Steam Co.*, 8 Bosw. 622; *Thayer* v. *Tool Co.*, 4 Gray, 75.

Under such circumstances they are treated as parties to the suit to the extent to which their respective interests are involved. Story, Eq. Pl., sects. 99, 116; 2 Daniell, Ch. Pr. 1213; 2 Smith, Ch. Pr. 111.

Persons of the class interested may by petition be made parties and let into the cause, if their rights and those of existing parties are so interwoven that they will be simultaneously disposed of. 1 Daniell, Ch. Pr. 406; Story, Eq. Pl. 116; *Wood* v. *Dummer*, 3 Mason, 315; *Gorman* v. *Russell*, 14 Cal. 531.

It is not required, according to any authority on the subject, that there shall be any formal order making them parties. The original leave to file their petition is considered to embrace each succeeding application. It *ipso facto* constitutes them parties.

Such persons coming in by petition, although they are not, by formal amendment or otherwise, made parties, are considered as such in the subsequent proceedings. Mitford, Eq. Pl. 178; *Waite* v. *Simple*, 1 S. & S. 219; *Binney's Case*, 2 Bland, 99; *Warfield* v. *Banks*, 11 G. & J. 97; 1 Daniell, Ch. Pr. 429; *Myers* v. *Fenn*, 5 Wall. 205.

In *Harrison* v. *Nixon*, 9 Pet. 491, divers parties not named as defendants intervened by mere petition in the Circuit Court, in a suit brought by a plaintiff, alleging he was the next of kin, against an executor. No order was asked for or granted making them parties. Their petitions were dismissed, and, upon the appeal prayed exclusively by such petitioners, the decree was reversed.

In *Ogilvie* v. *Knox Ins. Co.*, 2 Black, 539, the same rule was followed, and mere petitioners, being of the same class as the original complainant, were considered to be actual parties to the suit.

Other cases exhibit the practical application of this rule. *Blossom* v. *Railroad Company*, 1 Wall. 655; *Wittenburg* v. *United States*, 5 id. 820; *Crawshay* v. *Soutter*, 6 id. 739; *In re Cook & Younghall Railway Co.*, 4 Ch. App. 748; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

The withdrawal of their co-defendants, Akers and St. Louis County, did not eject them from the record, or in any manner deprive them of the full benefit of the pleading which they had made their own. *Kellogg* v. *Forsyth*, 24 How. 186; *Johnson* v. *Hammersly*, 24 Beav. 498; *Armstrong* v. *Stover*, 9 id. 277; *Todd* v. *Daniel*, 16 Pet. 523.

The stockholders were therefore properly before the court, and had the clear legal right to a rehearing on the decree of June 6, or to an appeal therefrom. 2 Daniell, Ch. Pr. 1460; *Ellison* v. *Thomas*, 1 DeG., J. & S. 18; *Kidd* v. *Cheyne*, 18 Jur. 848; *Barker* v. *Barker*, 39 N. H. 408; *Kellogg* v. *Forsyth*, *supra*; *Gifford* v. *Hart*, 1 Sch. & Lef. 409; *Osborne* v. *Uster*, 2 Bro. P. C. 314; *Westcott* v. *Bradford*, 4 W. C. C. 492; *Blossom* v. *Railroad Company*, *supra*; *Wittenberg* v. *United States*, 5 id. 820; *Stratton* v. *Jarvis*, 8 Pet. 4; *Crawshay* v. *Soutter*, 6 Wall. 739; *Bronson* v. *La Crosse Railroad Co.*, *supra*; *In re Cook & Younghall Railway Co.*, *supra*; *McVeigh* v. *United States*, 11 Wall. 259; *N. O. Railroad* v. *Morgan*, 10 id. 256.

Mr. William M. Evarts and *Mr. J. O. Broadhead*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

To entitle the petitioners to the writ asked for in this case,

they must show that they have a clear right to an appeal which has been refused by the Circuit Court. The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance, and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default.

This application is for a writ commanding the judges of the Circuit Court, or one of them, to allow the petitioners an appeal from the decrees in the cause, and a *supersedeas*. This is the only specific relief asked; and, in support of the application, it is insisted that Marie, Otis, Cutting, Jr., Cutting, and Fearing were admitted as parties to the suit March 25, when they filed their petition therefor, and that consequently they were in a position to demand an appeal as parties. It would, perhaps, be a sufficient answer to this position to say that no one of these petitioners has ever made application to the Circuit Court or either of the judges for the allowance of an appeal in his favor as a party to the suit. They have only asked to be permitted to intervene and become parties, in order that they might appeal.

But, if this were otherwise, the result would not be different; for the persons presenting the petition of March 25 never did in fact become parties, and it is apparent from the record that their present claim in that regard is an afterthought. They filed their petition to be made defendants in the suit, but it was never granted. Not only was no express order made to that effect, but there is nothing to show that they were ever in any manner recognized as parties, or that they ever supposed they were parties. Formal orders were made and conditions imposed upon the admission of Akers and St. Louis County as defendants. But they afterwards withdrew, and neither Cutting nor any of his associates attempted to act in their stead. Subsequently he and some of his co-petitioners united with other persons in another petition for leave to intervene, without in any manner claiming advantage from their former action, or even alluding to it.

We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for

leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus, in *Myers* v. *Fenn*, 5 Wall. 205, "the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;" and in *Harrison* v. *Nixon*, 9 Pet. 491, "inquiries were made as to the respective claims," as asked for, and "as to all parties who were claimants before the court by bill, petition, or otherwise, their complaint, petition, and proceedings were dismissed." So, in *Ogilvie* v. *Knox Ins. Co.*, 2 Black, 539, petitions were filed by certain creditors praying to be made parties, and that a receiver might be appointed, which was done; and in *Bronson* v. *La Crosse Railroad Co.*, 2 Wall. 304, certain stockholders in a corporation were permitted to appear in a cause to which the corporation was a party, and present their several claims by answer in the name of the corporation; but this having been afterwards found to be irregular, the answers were considered "rather by indulgence than a matter of strict right as the answer of the individual stockholders." Upon the same principle, it was held in *Railroad Company* v. *Bradleys*, 7 Wall. 575, that where an appeal had been prayed for, and subsequently an appeal bond, approved by one of the judges, had been filed in the court, it would be inferred that an appeal had been allowed, although there was no express order to that effect in the record.

From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. These petitioners seem to have been content to leave their interests in the hands of Akers; and, when he went out, they went with him. That the court understood this to be so is apparent from the following statement made by the judges in their return to the rule to show cause: "On June 6, 1876, . . . said Akers and said St. Louis County withdrew their

answers and dismissed their cross-bills, both said Akers and said St. Louis County purporting to act for themselves as stockholders, and for all other stockholders who might join them."

Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree.

No appeal lies from the order of Oct. 8, refusing them leave to intervene and become parties; for that was only a motion in the cause, and not an independent suit in equity appealable here.

Neither can these petitioners appeal as stockholders. Only parties, or those who represent them, can appeal. The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit, for the purpose of protecting their own interests in the corporation against unfounded and illegal claims against it, but this "remedy is an extreme one, and should be admitted by the court with hesitation and caution." *Bronson* v. *La Crosse Railroad Co.*, 2 Wall. 302. It is always addressed to the sound judicial discretion of the court. That we cannot control by *mandamus*.

We need not consider what rights these petitioners would have if Akers had not withdrawn his intervention before the decree. After his withdrawal, they had no representative stockholder party to the suit, and their position is the same it would have been if no parties had ever intervened in their interest. *Mandamus denied.*

HUMES v. SCRUGGS.

1 A general replication denies every allegation in the answer of a defendant not responsive to the bill. Therefore, he must prove his allegation of a decree in a former suit pleaded by way of estoppel.

2. A decree in a suit between husband and wife, confirming a conveyance of real estate made to her by him, does not bind his assignee in bankruptcy suing to set such conveyance aside on the ground that it was made in fraud of creditors.

3. If money, which a married woman might have had secured to her own use, is allowed to go into the business of her husband, be mixed with his property,

and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife upon the occurrence of his bankruptcy is a fraud upon his creditors, and void.

4. Fraud is generally a question of fact to be determined by all the circumstances of the case.

APPEAL from the District Court of the United States for the Northern District of Alabama.

This is a suit by the assignee in bankruptcy of John W. Scruggs to set aside a conveyance of certain real estate made by the latter to his wife, as being in fraud of the rights of creditors. The court below dismissed the bill; whereupon the assignee appealed here.

The facts upon which the decision of the court is based are set forth in its opinion.

Mr. Thomas C. Fullerton and *Mr. F. P. Ward* for the appellant.

No counsel appeared for the appellee.

MR. JUSTICE HUNT delivered the opinion of the court.

It is not entirely certain what the court is called upon to review in the present case. By the decree of the court below it is recited that upon the hearing of the cause upon the pleadings it is adjudged that the bill be dismissed. The record, however, comes to us with voluminous evidence upon the merits, and we have not the advantage either of an opinion of the court or of a brief by the party obtaining the decree. It will be necessary, therefore, to give attention to the case in both of its aspects.

The bill was filed by the assignee in bankruptcy of John W. Scruggs against the bankrupt's wife, alleging the adjudication of bankruptcy made upon a voluntary petition filed in June, 1868, and the fraudulent conveyance, in January, 1866, of property of the value of $50,000; that this covered all the property of the bankrupt, and that he was then insolvent. The defendant answered, admitting the conveyance, denying the fraud, alleging that the property conveyed to her was purchased and paid for with her money and for her, and that she believed for

several years that the title was taken in her name; that it was improved by her husband at an expense not exceeding $18,000, of which $4,400 belonged to her separate estate, and $2,400 was realized from the sale of a portion of the land. She denied that the deed to her conveyed all the property that her husband possessed, but did not state how much remained, or what it was, and she denied knowledge of his insolvency, if it existed.

As a distinct defence in bar of the recovery sought, she further alleges that on the eleventh day of November, 1867, by her next friend, she filed a bill in the State court against her husband, to which he answered on the same day, in which proofs were taken; and that in December of that same year a decree was rendered, in which the said deed of Jan. 14, 1866, was in all things ratified and confirmed. A copy of the decree is annexed to her answer. To this answer the plaintiff, the assignee, filed a general replication. It is supposed that this suit and this decree, forming a part of the answer of Mrs. Scruggs, furnished the support to the decree dismissing the bill in the present suit on the pleadings.

To this result there are two valid objections: —

1. By the interposition of a general replication, every allegation in the answer of Mrs. Scruggs not responsive to the bill was denied. No such allegation could be taken as true, but must be proved before it could be used by the party making it. The allegation of a former suit and of the decree therein came under this rule. It was denied that there was such a former suit, and that a decree was rendered therein affirming the transaction of May 14, 1866. How, then, can it be said with accuracy, upon the pleadings, when the answer was not responsive, and when a replication was filed, that there was a former suit and decree, and that by reason thereof the present bill must be dismissed? *Jacks* v. *Nichols*, 5 N. Y. 178.

2. Let it be assumed that the former suit and the decree therein are proved in a legal manner, still we cannot assent to the theory of its conclusiveness here. There would be little difficulty in making and sustaining fraudulent transfers of property, if the parties thereto could by a subsequent suit between themselves so fortify the deed that no others could attack it.

Mrs. Scruggs files her bill on the 11th November against her husband, to obtain a confirmation of the former proceeding. Her husband, nothing loth, files his answer on the same day. Twenty-one days thereafter, viz., Dec. 2, the term of the court opens. The papers are presented, proofs are filed, the counsel appear, and a decree of confirmation is adjudged. Certainly no one can complain in this instance of the delays of justice.

But without reference to these indications of collusion, we are of the opinion that a decree between these parties alone, cannot bind the assignee in bankruptcy. The principle is well settled that a judgment binds only the parties to it and their privies. *Bank* v. *Hodges*, 12 Ala. 118, was a decision upon a case very similar to the one before us.

In *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S. 244, the principle is thus laid down: "The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in another suit against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases, and to public judicial proceedings which are of the nature of judgments *in rem*." Many cases are cited in illustration of the principle.

This decree no doubt concluded Mr. Scruggs on the question of fraud. But he was already concluded by his deed, and we do not see that the estoppel by the decree is any more conclusive than that by the deed. Neither of them affect the assignee in bankruptcy, who is expressly authorized by the Bankrupt Act to attack any transfer made by the bankrupt in fraud of his creditors. Sect. 14.

If we look at the case upon the merits, we also find the result to be in favor of the assignee.

On the 14th of May, 1866, the husband conveys to his wife certain real estate in Huntsville, Ala., called the race-course property. The value of this property is estimated by the witnesses on the one side as high as $25,000, and by one of those on the other as low as $10,000. Others put it at $15,000 and $20,000. He conveyed to her at the same time the interest of one-third of the profits of a hotel in Corinth for five years, and afterwards conveyed to her the fee of the premises, the consideration for which is recited to be the sum of

$25,000. What the actual value of this property was does not distinctly appear. At this time he was hopelessly insolvent. Large debts are proved against him, and in his answer he admits his indebtedness then to have amounted to $300,000. In a deed of the same date, executed by the husband and wife to Francis Sanders, it is recited as follows, viz.: —

"Whereas the undersigned, John W. Scruggs, of the county and State aforesaid, is largely indebted to different persons residing in different localities and States; and whereas this indebtedness is individual and partnership indebtedness, being the partnership indebtedness of Scruggs, Donegan, & Co.; and whereas he is also largely involved as indorser for others, and likewise as surety, and as a member of the firm of Scruggs, Donegan, & Co., as acceptors of bills of exchange; and whereas, owing to the loss or displacement, resulting from the present civil war, of explanatory memoranda, schedules, &c., it is impossible for him at this time to state with accuracy the extent of his liabilities or their character, or to ascertain how much thereof has been remitted by the laches of creditors; and whereas he is anxious to adjust, settle, and discharge, to the extent of his ability, all just claims against him, but is unable at this time, for the reasons above stated, to nominate with accuracy his creditors."

This deed conveyed to Sanders certain lands in Huntsville, and certain lands in Arkansas, among others the plantation called "the Island Place," in trust, to convey the same to such creditors as Scruggs himself should, within twelve months, nominate and appoint.

We may safely assume the total insolvency of the husband at the time of the execution of the deed in question, and, if that is important, that the wife was aware of it.

It is sought to sustain the deed to the wife upon the theory that the land in question was purchased by her husband for her and with her money, and that she believed for years that the title had been taken in her name. Such is the allegation of her answer. The proof is to the contrary. It is true, according to some of the testimony, that she was entitled to certain sums from her relations, which were received by her husband, viz., $3,100 in 1852, or thereabouts; $2,300 at about the same time; $1,200 for a carriage in 1853; and $400 from

Mr. Coxe. These are the sums as stated by herself in her testimony, amounting to $7,000. In the deed of May, 1866, when we may suppose that both the husband and wife would place the sum at the highest amount that truth would permit, it is given at $4,500. We take it, therefore, at that sum. These sums so received he held and used in his business until the year 1866, when his failure occurred. Neither the husband nor the wife testifies that there was any agreement that the husband should hold these sums as and for the estate of his wife, or that when the property in question was purchased it was agreed to be held as her estate. On the contrary, the moneys were held and used by the husband for nearly fifteen years as his own property, and mingled with his personal and partnership affairs. The explanation given by his brother, if true, which is very doubtful, is essentially vicious. He states that it was at his suggestion that the deed was taken to Scruggs instead of his wife. He adds: "At the time referred to, John W. Scruggs was about to open a commission house in Charleston, and was without means or credit, and my reason for giving him this advice was, that the conveyance to himself would give him a credit, whereas then he had none."

But it is probably untrue in fact that this land was bought for her, as she alleges in the answer, or that she believed at any time that the title was taken in her name. As already suggested, the best possible case for the parties would be set forth in the deed which is the subject of the controversy. No such pretence is there set up. The consideration is based upon alleged indebtedness to the wife of a sum of $3,100 received on her account, of another like sum of $2,300, and of her release of dower in certain lands. The pretence that these sums had been agreed to be invested in these lands, and that she supposed it was done, is not suggested. We cannot but suppose this to be an afterthought.

If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the

same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband. *Fox* v. *Meyer*, 54 N. Y. 125, 131; *Savage* v. *Murphy*, 34 id. 308; *Babcock* v. *Gokler*, 24 id. 623; *Robinson* v. *Stewart*, 10 id. 190; *Carpenter* v. *Roe*, id. 227; *Hard's Lessees* v. *Longworth*, 11 Wheat. 199.

Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the case. If the husband in a state of absolute bankruptcy conveys to his wife property fairly worth $15,000 to $20,000, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors. Authorities *supra*.

We attach no importance to the recited releases of dower as adding a value to the consideration. The lands sold to Derrich, in which it is recited that the wife was dowable, had been conveyed to him in 1860, and the wife had joined in the conveyance and acknowledged the same. Derrich also denies that, in May, 1866, any release of dower was made or was delivered to him.

The lands sold to Peters do not appear ever to have been paid for by him, nor does it appear that they were ever conveyed to him. He had a bond for a title only.

The lands conveyed to Sanders were so conveyed in trust, to be conveyed to such persons as Scruggs should, within twelve months, nominate and appoint.

The pretended releases were mere devices to give color to a fraudulent deed. No benefit was given to the estate by means of them, nor did Mrs. Scruggs part with any thing of value.

Decree reversed and cause remanded, with directions to enter a decree for the complainant in accordance with this opinion.

UTLEY v. DONALDSON.

1. The telegraphic correspondence in this case, in relation to the sale and purchase of certain bonds, considered, and held to constitute a complete contract of sale upon the condition, or with an implied warranty, that the bonds were genuine.
2. The contract was not so modified by subsequent correspondence as to amount to a waiver on the part of the purchaser of such condition or warranty.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action to recover from Donaldson & Fraley the sum of $15,375, paid to them by the plaintiffs, for fifteen bonds, purporting to be first mortgage bonds of the Central Pacific Railroad Company, and which subsequently proved to be counterfeit.

The court below found the following facts: —

1. On the twenty-fourth day of May, 1871, Newman & Havens, bankers, of Leavenworth, Kansas, telegraphed to St. Louis from Leavenworth to W. Nichols, cashier of the Commercial Bank of St. Louis, as follows: —

"Get rate for $15,000, California Central Pacific R. R. bonds, delivered to-morrow."

This despatch was, on said day, shown by Nichols to defendants, and defendants made a bid for said bonds, *i.e.*, (100½) one hundred and one-half. This offer was reported by telegraph to Newman & Havens by Nichols, and was by them accepted by telegraph.

2. On the following day, May 25, Nichols received from Newman & Havens a letter, as follows: —

"LEAVENWORTH, KANSAS, 24th May, 1871.

"W. NICHOLS, Esq., *Cash.*, St. Louis, Mo.:

"DEAR SIR, — Your favor of the inst., with inclosure as stated, is received. We, this A.M., telegraphed you as follows, viz.: 'Get rate for $15,000, California Central Pacific R. R. bonds, delivered to-morrow.' Same is hereby confirmed. We herewith hand you bonds. Please close the transaction and telegraph us immediately. The party selling these bonds is waiting here to get

the money for them. This same gentleman is an entire stranger to us, therefore, will you be kind enough to satisfy yourself that the bonds are all right. We desire them sold without any recourse on us. Your early attention will much oblige, respectfully, yours,

"NEWMAN & HAVENS."

This letter accompanied fifteen papers, purporting to be so many bonds in said letter described.

Nichols handed this letter to defendants May 25, with the bonds, and proposed that the defendants should take said bonds without recourse. Defendants refused to take the bonds without recourse, but said they would do this; viz., would give to the Commercial Bank their (defendants') check for the agreed amount, $15,075, with the understanding that this check was not to be charged up by the Commercial Bank, where defendants kept their accounts, until defendants had sent the bonds to New York and learned that the bonds were ("O. K.") correct. If the bonds were found to be correct, the check was to be charged up against defendants, and Newman & Havens to be advised; if not, the bonds were to be returned to the Commercial Bank, and the check returned to defendants.

3. On the 24th of May, defendants having received invitation to make a bid from Nichols, as requested by Newman & Havens in their despatch, telegraphed to plaintiffs by night despatch as follows: —

"ST. LOUIS, May 24, 1871.

"To UTLEY, DOUGHERTY, & SCOTT:

"Make best bid fifteen Central Pacifics, quick.

"DONALDSON & FRALEY."

After sending this despatch, and before receiving reply thereto, to wit, on the morning of May 25, defendants were shown by Nichols the letter of May 24, from Newman & Havens above recited, and the bonds.

Plaintiffs received this despatch, and on the twenty-fifth day of May replied by despatch, as follows: —

"NEW YORK, May 25, 1871.

"To DONALDSON & FRALEY:

"We will buy Central Pacifics at a hundred and two and a half (102½).

"UTLEY, DOUGHERTY, & SCOTT."

Defendants received this despatch on the same day about ten A.M.; and on the same day replied by telegraphic despatch, as follows: —

"ST. LOUIS, May 25, 1871.

"To UTLEY, DOUGHERTY, & SCOTT, New York:

"We accept your offer, fifteen Centrals, one hundred two and a half.

"DONALDSON & FRALEY."

4. On the same day plaintiffs wrote and mailed a letter to defendants, as follows: —

"NEW YORK, May 25, 1871.

"DEAR SIRS, — Your telegram of to-day received. You have sold us fifteen thousand Central Pacific 6's at 102½ flat. . . . .

"Respectfully yours,

"UTLEY, DOUGHERTY, & SCOTT."

The fifteen bonds were delivered to defendants by Nichols, cashier of Commercial Bank, May 25, and were by defendants forwarded by express on the same day to the Bank of North America, New York, with a draft on plaintiffs for $15,375, the bonds to be delivered by the bank to plaintiffs on payment of the draft. By mail — mailed by defendants. On the morning of the 25th of May defendants sent to plaintiffs a letter, as follows: —

"ST. LOUIS, May 25, 1871.

"Messrs. UTLEY, DOUGHERTY, & SCOTT:

"GENTLEMEN, — In accordance with your offer for 15 Central Pac. 1st mort. bonds, 102½, we replied, We accept your offer, and have forwarded them by ex. to Bank North America, with draft attached for $15,375. We would further add, that we have purchased the bonds from a party strange to us; and, not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, coming to us through strange parties, we use this as a precaution, and not willing to take any risk.

"Respectfully yours,

"DONALDSON & FRALEY."

This letter was received by plaintiffs at New York on Monday, the 29th of May, a short time before the bonds were pre-

sented by the messenger of the Bank of North America for delivery to plaintiffs, and prior to defendants' draft for $15,375, which was presented at the same time as the bonds, as hereinafter stated.

5. On the 29th of May, Monday, the messenger of the Bank of North America, with the bonds, fifteen in number, and the draft of defendants for $15,375, appeared at the office of plaintiffs in New York, to deliver said bonds and collect said draft.

Plaintiffs had, on the said twenty-fifth day of May, sold the bonds "to arrive" to Rasmus & Lissignola, bankers and stock-dealers in New York, engaging to deliver them four days thereafter.

When the messenger of the Bank of North America arrived at the office of plaintiffs, with the bonds and draft, it lacked but five or ten minutes of the hour after which, by the rules of the New York stock board, deliveries of bonds and stocks sold could not be made for that day.

Utley, therefore, without examining the bonds, went hurriedly with the bank-messenger to the office of Rasmus & Lissignola, to be in time for delivery that day. Arriving there with the messenger of the bank, he asked Rasmus to examine the bonds, saying he had not had time to do so. Rasmus opened and briefly examined the bonds; said they seem to be correct; and, at the request of Utley, gave the messenger of the Bank of North America Rasmus & Lissignola's check for the amount agreed between them and plaintiffs, $15,403.12, which check was paid.

On the same day, and after the delivery of the bonds as above stated, plaintiffs wrote and mailed letter to defendants as follows:—

"NEW YORK, May 29, 1871.

"MESSRS. DONALDSON & FRALEY, St. Louis:

"DEAR SIRS,—Yours of 25th, and 15 thousand Centrals, with draft, received. The Centrals all correct, and we telegraphed you to that effect.

"Respectfully yours,

"UTLEY, DOUGHERTY, & SCOTT."

7. On the same day plaintiffs sent telegraphic despatch to defendants, as follows:—

"NEW YORK, May 29, 1871.

"To DONALDSON & FRALEY:

"Centrals all right.

"UTLEY, DOUGHERTY, & SCOTT."

8. On receipt of this despatch by Donaldson & Fraley, on the 29th or 30th of May, they informed Mr. Nichols, cashier of the Commercial Bank, that the bonds were all correct; whereupon Donaldson & Fraley's check for $15,075 was charged up, and Newman & Havens were advised by the Commercial Bank, and remittance made to Newman & Havens.

9. On the 12th of June, 1871, information was for the first time received in New York, or elsewhere, that there were counterfeits of these bonds in existence.

On that day plaintiffs wrote and mailed a letter to defendants, as follows: —

"JUNE 12, 1871.

"Messrs. DONALDSON & FRALEY, St. Louis, Mo.:

"DEAR SIRS, — Yours of 8th and 9th and 3d, Leavenworth, from Bank North America, 5th from U. & C. received.

"Look out for counterfeit Central Pacific 6's. Some appeared on market to-day. . . .

"Respectfully yours,

"UTLEY, DOUGHERTY, & SCOTT."

10. On the next day, June 13, 1871, plaintiffs sent telegraphic despatch to defendants, as follows: —

"NEW YORK, June 13, 1871.

"To DONALDSON & FRALEY:

"Central Pacifics you sold us probably counterfeit. Trace your party. Bonds shipped to Europe; can't hear from them for several days.

"UTLEY, DOUGHERTY, & SCOTT."

11. On the same day, June 13, 1871, plaintiffs wrote to defendants, and mailed letter, as follows, viz.: —

"JUNE 13, 1871.

"MESSRS. DONALDSON & FRALEY, St. Louis, Mo.:

"DEAR SIRS, — Yours of the 10th, &c. . . . We feel uneasy with regard to the genuineness of the Central Pacific 6's you sold us. The bonds have been shipped to Europe, and cannot be heard from for several days. In case your parties are doubtful, it would be

well to act at once as if the bonds are not genuine. There has been no suspicion that there were counterfeits out until yesterday.

"Respectfully yours,

"UTLEY, DOUGHERTY, & SCOTT."

12. On June 13, defendants sent a telegraphic despatch to plaintiffs, as follows: —

"ST. LOUIS, June 13, 1871.

"To UTLEY, DOUGHERTY, & SCOTT:

"We refer you to our letter, May 25, in which we sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, Leavenworth, without risk. Will aid you all we can, if counterfeit.

"DONALDSON & FRALEY."

The bonds in question were sold by Rasmus & Lissignola, immediately after they purchased them, to parties who sent them to Europe, whence they were returned declared to be counterfeit, and returned to Rasmus & Lissignola, who immediately demanded repayment from Utley, Dougherty, & Scott, plaintiffs; whereupon, on July 12, plaintiffs sent a telegraphic despatch to defendants, as follows: —

"NEW YORK, July 12, 1871.

"To DONALDSON & FRALEY, St. Louis:

"The Central Pacifics bought of you in May are declared counterfeit. We shall look to you for indemnity.

"UTLEY, DOUGHERTY, & SCOTT."

13. On the same day, July 12, 1871, plaintiffs wrote and mailed to defendants a letter, as follows: —

"NEW YORK, July 12, 1871.

"MESSRS. DONALDSON & FRALEY, St. Louis:

"GENTLEMEN, — We beg to inform you that the Central Pacific bonds we bought from you on 25th May last have been returned from Europe, and are declared counterfeit. On behalf of the parties for whom we purchased the bonds we shall look to you for indemnity. We do not consider that the terms of your letter of 25th May in any way precludes us from our recourse upon you, especially not, in view of the facts disclosed by your telegram to us of June 13, 1871. We therefore telegraphed you to-day as follows: 'The Central Pacifics we bought of you in May are declared counterfeit. We shall look to you for indemnity.'

"Yours truly,

"UTLEY, DOUGHERTY, & SCOTT."

14. On the 12th of July defendants wrote and mailed to plaintiffs a letter, as follows: —

"ST. LOUIS, July 12, 1871.

"Messrs. UTLEY, DOUGHERTY, & SCOTT,

"New York City:

"GENTLEMEN, — Your telegram received, in which you state that the Central Pacifics are counterfeit, and that you look to us for indemnity. In my former letter on this subject we referred you to our letter of May 25, and again call your attention to it. Will you have the kindness to write to us in detail on what grounds you propose holding or looking to us for indemnity?

"An early answer will oblige, very respectfully,

"DONALDSON & FRALEY."

On the 3d of August, 1871, defendants wrote and mailed to plaintiffs a letter, as follows: —

"ST. LOUIS, Aug. 3, 1871.

"Messrs. U., D., & S.:

"GENTLEMEN, — Mr. Fraley just returned from Madison to-day, hence the delay in answering yours of 25th. We are acting under legal advice, and must refuse to make any assignment of claim, as we are not aware yet that we have any.

"Respectfully yours,

"DONALDSON & FRALEY."

15. On the 8th of August, 1871, plaintiffs wrote and mailed to defendants a letter, as follows: —

"NEW YORK, Aug. 8, 1871.

"Messrs. DONALDSON & FRALEY, St. Louis, Mo.:

"GENTLEMEN, — We have yours of 3d inst., and regret that you do not give us any more satisfactory information. You will allow us to remind you that we paid your draft for $15,375, and received therefor nothing but counterfeit bonds. In answer to our despatch to you that counterfeit Central Pacifics had appeared in the markets, you sent us a telegram, referring us to your note of 25th May, and saying, at the same time, 'Will aid you all we can, if counterfeit.' Setting aside all questions of legal liability, we submit to your sense of fair dealing, whether you are fulfilling this pledge. You now refuse to make an assignment of any claim you may have against the parties from whom you received the bonds, and assign as the reason for such refusal that you are under legal advice, and do not know whether you have any claim. But we

do not ask you to guarantee that you had any claim, and it seems to us that the fact of your being under legal advice is no reason why you should not do every thing in your power to help us in recovering the money you have had from us for worthless bonds, but rather a reason why you should help us the more readily. We beg to ask from you a full statement of the precise position you occupied in relation to these bonds; and, if this will aid us in our efforts to make good our loss, you ought to be thankful, and also willing, to give us any rights you have against these parties.

"Yours truly,

"UTLEY, DOUGHERTY, & SCOTT"

16. On the 12th of August, 1871, defendants wrote and mailed to plaintiffs a letter, as follows: —

"ST. LOUIS, Aug. 12, 1871.

"Messrs. U., D., & S.:

"GENTLEMEN, — In reply to your letter regarding the position we have taken, we can only say, that, when you consider the circumstances connected with same, we think that you or anybody would act likewise; viz., Some time in May the Commercial Bank called on us and offered the bonds, and we made a bid. The cashier then informed us that the inquiry came from Newman & Havens, Leavenworth, and they would telegraph to them the bid we made to the Commercial Bank. In short time answer to Commercial Bank from Newman & Havens, that they would accept the bid, and had forwarded bonds to Commercial Bank. Upon arrival of bonds at the Commercial Bank, they received a letter from Newman & Havens, stating that they had never dealt in like bonds, and they were selling them for strange parties, consequently sell them without recourse. The Commercial Bank tendered us the bonds under same condition; and we refused to purchase bonds in the manner presented, but gave the Commercial Bank a check under the following conditions, — not to charge the check against us until we had been informed by you that the bonds were O. K. We then forwarded the bonds, and wrote you precise, that we had not ever handled any of the bonds, and we sell them without recourse, and particularly asked you to examine them, and more distinctly said, we sell without recourse as to genuineness, as they come from strange parties, and use this precaution, not willing to take any risk whatever. Upon receipt of the bonds, you telegraphed us, 'Centrals all right,' and also wrote by mail, confirming your despatch, by saying, received bonds and draft, and found

them all correct. When we received this information, we then informed the Commercial Bank to charge up check, which they did, and at the same time credited Newman & Havens; and we are furthermore informed, the parties of whom Newman & Havens purchased did not call for the money within ten days after this information of bonds being correct. Now, you see plainly that you are all to blame. Had you used the necessary precaution in examining the bonds, specially when your attention was called by us selling without risk, not only would none of us have any trouble or unpleasantness, but would have caught the thieves and brought them to justice. Now, please inform us what else could we have done. It shows that we acted prudently and with care. It is true, you may say, you received the bonds before the letter; but even and more so should you have examined them, and informed us. You are aware that New York is the market to detect all irregularities in the bonds spoken of, and you could easily have discovered, had you not been careless. Now, you plainly see our position. The Commercial Bank will not take them back from us, unless they are compelled to do so; and why should Donaldson & Fraley suffer for negligence of yours, when they used all precautions and measures at the time? It is true, it is hard for you to part with your money, but not more so than us, whilst we are in no manner to blame. Upon your information, confirming the genuineness of the bonds, we parted with the money received for the bonds. Should the Commercial Bank, or Newman & Havens, at any time come forward and offer to redeem the bonds, we certainly would be most happy, and be much better satisfied than the way it is now.

"Regarding our writing, that we would aid you all we could, did not infer that if you made a demand upon us for the money that we would pay same, but meant, that if it was in our power to make parties originally selling them replace them, we would do so; and we are more so willing now than ever; but we cannot concede nor agree to give you any claim against the Commercial Bank, whether we have legal right or not. It would certainly be admitting, on our part, that if we assign claim against Commercial Bank, that you certainly have likewise claim against Donaldson & Fraley, and also right to assign, which we really cannot admit, as we positively do not believe so. We are ready at any time to testify to the facts as they are, and were; and, should the law declare us wrong, we feel confident that Newman & Havens and Commercial Bank will abide by same; but under no circumstances will they

refund without action, as they firmly believe, as we do, that your claim is not just, under the circumstances.

"If you were right in your demands, tell us, in the name of the law, justice, or common custom, would we, or any dealer, receive from any stranger or honest party known to us, but not responsible, any securities to be sold on arrival in New York, and the funds to be credited upon sale and delivery in New York, and especially if sold under the conditions we sold bonds to you? How would you have proceeded in this or any case? The sum total is, you have made a mistake, and we are ready to assist you all we can to defend your claim, if you have any. We now refer you to our last letter, in which we informed you that we would rather you would begin action immediately, in order to have things settled and the suspense removed. What we have written we will enter as evidence, and has been written with consent of Commercial Bank, as they are fair and honorable.

"Trusting you now plainly see our position, and we feel sanguine, that, were you placed in our position, you certainly would not have acted differently,

"Yours, friendly,

"DONALDSON & FRALEY."

17. Utley (plaintiff) subsequently, in September, 1871, stated to defendants, when asked, in view of defendants' letter of May 25, 1871, which he admitted having received, why he did not examine the bonds with care before paying for them, that he received similar letters from the country every day, and that he supposed defendants were cautious only because they had not handled any of these bonds before.

18. The money paid by Donaldson & Fraley by their check to the Commercial Bank, and by it to Newman & Havens, was not, according to the statement of Newman & Havens to Nichols, cashier, called for, nor paid by Newman & Havens at Leavenworth, Kansas, to the party who sold the bonds to Newman & Havens, for two or three weeks after it was received by Newman & Havens from the Commercial Bank.

19. Before writing the letter of May 25, 1871, hereinbefore set out, and transmitting the bonds to New York, the defendants, who had never seen any Central Pacific bonds, took said bonds, or some of them, to two banking establishments in the city of St. Louis, and asked one of the officials of each of said banks

whether they knew about them, but was informed that they did not, as those bonds were not known or dealt in in this market.

20. Both the plaintiffs and defendants were brokers and stock-dealers, the former in New York and the latter in St. Louis, and were business correspondents of each other.

21. That the bonds sold by defendants to plaintiffs were spurious.

22. That the identical bonds sold by defendants to plaintiffs have been produced upon the trial by the plaintiffs, to be surrendered if they shall recover.

23. That the defendants, when they sold and delivered the bonds to plaintiffs, did not know or believe that the bonds were forged or spurious, and they did not know this until informed thereof by the plaintiffs on June 12, 1871, as hereinbefore stated; and their only knowledge of the bonds prior to the sale and delivery thereof appears from the facts hereinbefore set forth.

Upon the foregoing facts the court found as a conclusion of law that the defendants were entitled to judgment; to which finding and conclusion of law the plaintiffs then and there excepted.

Judgment having been rendered for the defendants, the plaintiffs sued out this writ of error.

Mr. Charles M. Da Costa for the plaintiffs in error.

The judgment below is not warranted by the facts contained in the special finding, and must be reversed. *Prentiss* v. *Zane*, 8 How. 470; *Graham* v. *Bayne*, 18 id. 60.

The contract between the parties was effected and concluded by their telegraphic correspondence of May 25, 1871. By that contract the defendants impliedly warranted the genuineness of the bonds sold and to be delivered thereunder.

The letter of May 25, 1871, written by the defendants to the plaintiffs, after the making of the contract, and received by them on the 29th May, and the acts and doings of the plaintiffs on its receipt, neither released the defendants from such warranty, nor amounted to a modification in that respect of the contract as originally entered into

Mr. William Patrick, contra.

The contract between the parties was not completed by the telegrams. The letter of the defendants to the plaintiffs, dated May 25, 1871, was written contemporaneously with the telegrams of that date, and was intended to be, and in law should be, read as a part of the acceptance of plaintiffs' offer. It is clear from that letter, that, at the time of sending their telegram, the defendants had no intention of selling the bonds, except without recourse as to genuineness.

Should the court rule against this point, then it is insisted that the letter of May 25, and the delivery tendered under the terms thereof, together constituted a proposition to modify the terms of the contract entered into by telegraph; that plaintiffs had the right in law either to stand by the original contract and reject the proposed modification, or to accept it without new or additional consideration; that, having accepted the delivery tendered under the terms of that letter, they are in law to be regarded as having waived any other or different performance from that tendered, and to be now estopped from claiming that they did assent to the modification of the contract, or the performance tendered and received.

Assuming that the telegram of plaintiffs' offering 102½, and the telegram of defendants accepting that offer, constituted the contract, there can be no question but that the delivery tendered under the letter of May 25 was in effect a refusal by defendants to fulfil that contract, unless plaintiffs would agree to modify it.

After an agreement has been reduced to writing, it is competent for the parties at any time before breach of it, by a new contract not in writing, either to altogether waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary, or qualify, the terms of it, and thus to make a new contract. *Gross* v. *Lord Nugent*, 5 Barn. & Ad. 65; *Lawrence* v. *Dole*, 11 Vt. 549; *Medemak Bank* v. *Curtis*, 24 Me. 36.

And when before breach a new contract is substituted for a previous one, no consideration is necessary if the substituted

contract has become executed. *Lawrence* v. *Dole*, *supra*; *Young* v. *Hunter*, 2 Seld. 207.

Plaintiffs having acted on the letter of May 25, and accepted the delivery tendered, thereby waived a different performance. *Shields* v. *Pettee*, 2 Sandf. 262; *Reed* v. *Randall*, 29 N. Y. 358.

Acceptance is a question for the jury, *Corning* v. *Colt*, 5 Wend. 256; and, having been found as a fact by the court below, its finding is conclusive.

Plaintiffs, by accepting the performance tendered, put it out of the power of defendants to make other performance.

A party whose acts prevent the performance of a condition cannot avail himself of such non-performance as a ground of action. His acts estop him. *Young* v. *Hunter*, *supra*; *Richardson* v. *Cooper*, 25 Me. 450.

Where a loss must fall on one of two innocent persons, it must be borne by him whose conduct occasioned it.

In the case at bar, defendants notified plaintiffs that the bonds came to them from strange hands, that they had never before handled any of them, that they were unwilling to take any risk, and would only sell without recourse as to genuineness; consequently, they requested the plaintiffs to "please examine them," and, upon being found correct, telegraph immediately (Centrals all O. K.). Plaintiffs received this notification before the bonds, failed to make an examination, but telegraphed defendants, and also wrote them, "Centrals O. K." They cannot now contravene the statement thus made and relied on, without fraud on their part and injury to another. *Dair* v. *United States*, 16 Wall. 1.

The court below finds that both plaintiffs and defendants were innocent parties, and that in view of these facts the loss arising from the bonds turning out to be spurious should fall upon the plaintiffs, as the conduct of defendants had been fair and admonitory, and that of plaintiffs grossly negligent.

Defendants parted with their money under the same circumstances as plaintiffs, but on the faith of the acceptance of the bonds by plaintiffs under the letter of May 25, 1871, and plaintiffs' letter and telegram that the Centrals were "O. K."

The rule of law under this head clearly upholds the finding of the court below. *Dair* v. *United States*, *supra*; *Butler* v. *United States*, 21 Wall. 272.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action at law, brought by the plaintiffs in error. The case was submitted to the court without the intervention of a jury, pursuant to the act of Congress of March 3, 1865, 13 Stat. 501.

The court found specially.

The question presented for our determination is whether the facts found are sufficient to support the judgment. Those facts are neither voluminous nor complicated.

On the 24th of May, 1871, Newman & Havens, bankers, of Leavenworth, telegraphed to Nichols, the cashier of the Commercial Bank of St. Louis, to "get rate for $15,000 California Central Pacific Railroad bonds, delivered to-morrow." The defendants offered "100½." Newman & Havens accepted by a telegraphic despatch. On the 25th of May Cashier Nichols received from Newman & Havens the bonds, and also a letter, in which they said, "The party selling these bonds is waiting here to get the money for them. He is an entire stranger to us." "We desire them sold without any recourse on us." On the same day Cashier Nichols showed this letter to the defendants, and proposed to deliver the bonds without recourse. They refused to receive them on such terms, but offered to take them, and pay for them when ascertained to be good; otherwise, to return them. The cashier acceded to this proposition. On the 24th of May the defendants telegraphed to the plaintiffs, who were brokers in the city of New York, "Make best bid for fifteen Central Pacifics, quick." The plaintiffs answered, on the 25th of May, that they would buy at 102½. Their despatch to this effect reached the defendants about ten A.M. the same day. The defendants answered by despatch on that day, "We accept your offer." The bonds were delivered by the cashier to the defendants on the 25th of May, and were by them forwarded by express on that day to a bank in New York, with a draft on the plaintiffs for $15,375, the bonds to be handed over on the payment of the draft. On

the morning of that day the defendants addressed a letter to the plaintiffs, which is the hinge of this controversy. It is as follows: —

"In accordance with your offer for 15 Central Pac. 1st mort. bonds, 102¼, we replied, We accept your offer, and have forwarded them by ex. to Bank North America, with draft attached for $15,375. We would further add, that we have purchased the bonds from a party strange to us; and, not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, coming to us through strange parties, we use this as a precaution, and not willing to take any risk."

This letter reached the plaintiffs on the 29th of May, a short time before the draft and bonds were presented. The plaintiffs had sold the bonds "to arrive" to Rasmus & Lissignola. They could not be delivered after two o'clock. It was within a few minutes of that time when the messenger of the bank presented himself. One of the plaintiffs went with the messenger to the office of their vendees, and requested Rasmus to examine the bonds. He did so, said they seemed to be correct, and thereupon gave a check for the amount his firm had agreed to pay for them. This check was duly paid. On the same day the plaintiffs wrote to the defendants, "The Centrals all correct, and we telegraphed you to that effect." Such a despatch had been sent. Upon receiving it, the defendants paid the bank for the bonds, and the money was remitted by the bank to Newman & Havens. On the 12th of June information was received for the first time in New York, or elsewhere, that there were in existence counterfeits of such bonds. On that day the plaintiffs wrote to the defendants, "Look out for counterfeit Central Pacifics; some appeared on market to-day." On the next day the plaintiffs telegraphed to the defendants, "Central Pacifics sold us probably counterfeit. Bonds shipped to Europe. Can't hear from them for several days." On the same day the plaintiffs wrote to the defendants to the same effect, and said further: "In case your parties are doubtful, it would be well to act at once as if the bonds were

not genuine. There has been no suspicion of counterfeits until yesterday." On the same day, June 13, the defendants replied by despatch: "We sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, of Leavenworth, without risk." The bonds were counterfeit, and the plaintiffs refunded to Rasmus & Lissignola the amount they had paid. On the 12th of July the plaintiffs telegraphed to the defendants, "The Central Pacifics bought of you in May are declared counterfeit. We shall look to you for indemnity." On the same day the defendants replied by telegraph, and asked upon what ground it was proposed to hold them liable. Some subsequent correspondence took place between the parties, which it is unnecessary to refer to in detail. The plaintiffs asked a transfer of the claim of the defendants, whatever it might be, but without guarantee, against the bank. This the defendants refused to give. The money paid to Newman & Havens by the bank was not called for by the party from whom they received the bonds for two or three weeks after the money was paid to them.

Before examining the case in its strictly legal aspects, it is proper to make several remarks suggested by the facts as found.

1. The defendants sold the bonds absolutely by their despatch of the 25th of May. The qualification insisted upon was, by their letter of that date, received by the plaintiffs on the 29th. If the defendants intended to qualify, it should have been done in the despatch. This would have given the plaintiffs notice in time for reflection before the presentation of the draft, might have prevented their selling the bonds before the letter was received, and would have enabled them to avoid the hurry and confusion incident to the payment of the draft and the delivery of the bonds to their vendees. If the draft had not been paid at sight, it would doubtless have been protested.

2. The circumstances attending the purchase of the bonds by the defendants are shown in our analysis of the facts of the case. The statement in the letter upon the subject is not accurate.

3. They refused upon any terms to put the plaintiffs in

their place with respect to any claims they might have against the Commercial Bank.

4. They were notified on the 12th of June that the bonds were counterfeit. If they had thereupon at once caused Newman & Havens to be advised also, it is not improbable that the latter would have retained the funds, and thus have saved from loss all the honest parties through whose hands the bonds had passed. The defendants failed to take any step whatever in this direction.

It cannot be questioned that the despatches between the parties on the 25th of May constituted a complete contract of sale, upon the condition or with an implied warranty, which it is not material here to consider, that the bonds were genuine. Nor can it be doubted that, if the bonds had been delivered without any thing further occurring, the defendants, upon the bonds proving to be counterfeit, would have been liable in this action. *Taylor* v. *Merchants' F. Ins. Co.*, 9 How. 390; Benjamin on Sales, 56; *Flyn* v. *Allen*, 57 Penn. St. 482; *Webb* v. *Odell et al.*, 49 N. Y. 583.

Was this contract changed so that this condition or warranty was waived by the plaintiffs? In other words, did the letter of the defendants propose the modification insisted upon, of the pre-existing contract, and if so, did the plaintiffs agree to it, and accept the delivery of the bonds accordingly?

We pass by without remark the plaintiffs' propositions that the alleged modification was within the Statute of Frauds, and could not, therefore, be effectually accepted otherwise than in writing; that there was no consideration for such an agreement; and that, if made, it was contrary to public policy, and therefore void. The view which we take of the case renders it unnecessary to consider either of these points.

The first sentence of the letter relied upon by the defendants recognizes distinctly the contract as made by the despatches. The defendants say: "In accordance with your offer for 15 Central Pac. first mort. bonds, 102½ we replied, We accept your offer, and have forwarded them by ex. to Bk. North America, with draft attached for $15,375."

This, standing alone, would have been a mere carrying out of the contract as made, and as it must have been understood by

both parties. The stress of the case is upon what follows. The letter proceeds: "We would further add, that we have purchased the bonds from a party strange to us." They had in fact bought them from the Commercial Bank, but were not to take them unless genuine, and were not to pay for them until found to be so. Next: "And not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central O. K.)." The phrase, "we would sell without recourse," considered in the light of the context and the circumstances, may well be interpreted to mean that the writers would prefer or like so to sell, if it could be done. This view derives support from the succeeding member of the sentence, "please examine," &c. Examine for whom? It is not said, examine for yourselves. The language employed is usual where the thing asked is for the benefit of the asker, but not where it is for the benefit of the party addressed. Lastly, it is said: "We do not doubt the bonds, but, coming through strange hands, we use this precaution, and are not willing to take risk." This is consistent with the construction we have given to the preceding clause. If the examination the plaintiffs were requested to make showed clearly that the bonds were not counterfeit, then there could be no risk, whether the sale was with or without warranty of genuineness. In connection with these views, it is to be observed that while the bonds and draft were sent on pursuant to the original contract, which is distinctly recognized, it is not said in the letter in plain terms, such as would naturally have been used if such had been the intent of the writers. We will sell only at your risk as to genuineness. We will not guarantee it: examine for yourselves. If the bonds are counterfeit, and you take them, the loss will fall upon you, and not upon us. If this language, or terms equally clear and explicit, had been used, the case would have presented a very different aspect. "Every intendment is to be made against the construction of a contract under which it would operate as a snare." *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405.

Upon the whole letter, considering what it does and what it

does not contain, we are unable to come to the conclusion that the defendants intended to require that the modification since insisted upon should be made, and to make such modification the condition upon which the plaintiffs should take the bonds, if they took them at all. This result leaves the rights of the parties as they were under the original contract, and entitles the plaintiffs to recover.

But conceding for the purposes of this opinion that the letter did contain such a proposition or annunciation as is insisted upon, then the inquiry arises whether it was so understood and agreed to by the plaintiffs.

There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the modification of a contract already made as it was to making it originally. Where there is a misunderstanding as to any thing material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly.

In *Phillips* v. *Bistotti*, 2 B. & C. 511, the defendant was a foreigner, and understood the English language imperfectly. Certain jewelry was struck off to him at auction for eighty-eight guineas. He was sued for that amount, and set up as a defence that he thought he had bid forty-eight guineas. Abbot, C. J., left it to the jury to find whether the mistake had actually occurred, "as a test of the existence of the contract." Benj. on Sales, 48.

In *Baldwin et al.* v. *Middleburger*, 2 Hall, 176, the defendant bought merchandise of the plaintiff, and it was agreed that it should be paid for by the note of a third person payable to the defendant, to be by him indorsed to the plaintiff. After the goods were delivered the note was tendered, indorsed without recourse. The plaintiff refused to receive it, insisting that the agreement was that the note should be indorsed without this qualification, and thereupon brought the suit. The court left it to the jury to find whether there was a misunderstanding

between the parties as to the manner of the indorsement. The jury so found; and it was held that the plaintiff was entitled to recover as if there had been nothing said about the note, there being no such assent of the two minds as was necessary to make a contract in relation to it.

In *Coles* v. *Browne*, 10 Paige, 526, a block of lots was struck off at auction to the defendant. The plaintiff insisted and proved that the sale was of the lots separately. The defendant insisted that his bid was for the entire block as one parcel, and that he so understood the premises to be offered and sold. The vendor instituted the suit for specific performance. The evidence rendered it doubtful whether the defendant's allegations as to his understanding and bid were not true, and upon that ground the Chancellor dismissed the bill. If there was a misunderstanding on the subject between the parties, there was clearly no contract. See also *Calverly* v. *Williams*, 1 Ves. Jr. 210; *Saltus* v. *Pryn*, 18 How. (N. Y.) Pr. 512; *Bruce* v. *Pearson*, 8 Johns. (N. Y.) 34; *Crane* v. *Portland*, 9 Mich. 493; 2 Pars. Contr. (4th ed.) 475 *et seq.*

It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*. *Hazzard* v. *N. E. M. Ins. Co.*, 1 Sumn. 218.

"Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding." *Darnley* v. *The Proprietors, &c.*, 2 Law Rep. H. L. 43, 60.

The plaintiffs were not asked to assent expressly with respect to the waiver of the warranty, if it were demanded, and made no such answer. They were asked to "please examine," &c., and to telegraph the result. This they did. The despatch was wholly silent as to any thing else. That they understood the waiver was demanded as a *sine qua non* in no way appears. On the other hand, the contrary is clearly manifest. The moment they had reason to apprehend that the bonds might be

counterfeit, they notified the defendants; and, as soon as it became certain they were so, the defendants were advised of the fact, and that they would be looked to for indemnity. The defendants denied their liability by reason of their letter. In due time this suit was brought. Conceding that both parties have acted in good faith, it is clear that there was a misunderstanding between them as to the meaning and effect of the letter, and that the plaintiffs never understood and agreed to it as it is now interpreted and insisted upon by the defendants. The *aggregatio mentium* requisite to give that interpretation effect was, therefore, wanting.

To constitute the abandonment of a contract, the act must be mutual. *Robinson* v. *Page*, 3 Russ. 122.

It has been held that, to make a negotiation for the modification of a contract effectual, it must appear that it was the intention of the party proposing it wholly to abandon the original contract, if the modification proposed were not assented to. *Murray* v. *Harway*, 56 N. Y. 347; *Robinson* v. *Page*, *supra*.

"A waiver of a stipulation in an agreement, to be effectual, must be made intentionally, and with knowledge of the circumstances." *Darnley* v. *The Proprietors, &c., supra; Howard et al.* v. *Carpenter*, 2 Md. 259.

When one party assents to a contract, relying upon the representations of the other, his assent is given upon the condition that the representations are true. *Duncan* v. *Hoge*, 24 Miss. 671.

Judgment reversed, with directions to the court below to render a judgment for the plaintiff in error.

MR. JUSTICE STRONG, with whom concurred MR. JUSTICE CLIFFORD and MR. JUSTICE HUNT, dissenting.

I dissent from the judgment given in this case. Before the plaintiffs received the bonds, and before they accepted or paid the draft drawn upon them by the defendants, they were notified that the defendants would sell without recourse, and that they were unwilling to run any risk. They were requested to examine, and telegraph to the defendants whether the bonds were genuine, and this as a precaution of the defendants against

risk. The letter of the defendants clearly manifested an intention not to deliver the bonds unless they were genuine, or unless the plaintiffs would take them at their own risk. On any other terms the plaintiffs had a right to take them. Inquiry and notice to defendants afterwards would have been idle, and would have been no precaution. Consequently the receipt of the bonds by the plaintiffs, after the notice given to them, can have no other meaning than that they took them at their own risk.

MR. JUSTICE DAVIS did not sit in this case.

DOYLE v. WISCONSIN.

Sect. 1007 of the Revised Statutes, which, as amended by the act of Feb. 16, 1875 (18 Stat. part 8, p. 316), provides that, where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States.

ON motion to set aside proceedings in execution of a judgment of the Supreme Court of the State of Wisconsin.

On the fifteenth day of August, 1876, the Supreme Court of Wisconsin rendered a judgment ordering that "a peremptory writ of *mandamus* do forthwith issue out of and under the seal of the court, to be directed to the respondent [plaintiff in error], commanding him, and in his absence the assistant secretary of State, forthwith, within twenty-four hours after the service of the writ," to recall the license given by him to the Continental Insurance Company of the city of New York to do business in that State. The writ was issued and served on the same day, and on the next, Aug. 16, its command was obeyed. On the 10th October, 1876, this writ of error was sued out in due form, and bond given to operate as a *supersedeas*.

The plaintiff in error now moves that all the proceedings in execution of the judgment within ten days after its rendition

may be vacated and set aside, and that all further process be stayed.

Argued, for the plaintiff in error, by *Mr. William Allen Butler* and *Mr. I. C. Sloan*, who cited *Slaughter-House Cases*, 10 Wall. 273; *Telegraph Co.* v. *Eyser*, 19 id. 419; *Board of Commissioners* v. *Gorman*, id. 661; *Kitchen* v. *Randolph*, 93 U. S. 86.

Mr. Charles W. Felker, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The claim on the part of the plaintiff in error is, that as a writ of error to operate as a *supersedeas* might issue from this court to re-examine the judgment of the court below, a writ to carry the judgment into effect could not issue from the State court until the expiration of ten days after the rendition of the judgment. Whether this is so or not depends upon the effect to be given to that clause in sect. 1007, Revised Statutes, which, as amended by the act of Feb. 18, 1875, 18 Stat., part 3, p. 316, reads as follows: "And in such cases, when a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days;" that is to say, until the expiration of ten days after the rendition of the judgment.

The writ of error was issued in this case under sect. 709 of the Revised Statutes, which is a reproduction of sect. 25 of the Judiciary Act of 1789, 1 Stat. 85, as amended before the revision. The part of sect. 1007 referred to is the reproduction of a similar provision in sect. 23 of the same act. The Revised Statutes are a revision and consolidation of the old statutes, rather than an enactment of new. 16 Stat. 96; 14 id. 75, sect. 2. Sect. 5600 provides that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." This makes it proper that we should look to the original act to ascertain the legislative intent in cases of doubt.

Going, then, to the old law, we find that sect. 22 relates entirely to writs of error for the review of judgments and decrees in the courts of the United States. Then follows sect. 23, which provides "that a writ of error as aforesaid," clearly referring to the writ provided for in the preceding section, "shall be a *supersedeas*, and stay execution in cases only where the writ of error is served . . . within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of the term of ten days, execution shall not issue in any case where a writ of error may be a *supersedeas*." Read in this connection, it is clear that the provision for delay of execution refers only to judgments and decrees in the courts of the United States. Sect. 25 then provides for writs of error to a State court, and adopts the regulations of sect. 22, as to the writ and proceedings under it, but omits entirely any direction as to delay of execution upon the judgment.

From this we think it manifest that it was not the intention of Congress, under the act of 1789, to interfere at all with the practice of the State courts as to executions upon their judgments, until a *supersedeas* was actually perfected, and that the same effect must be given to the corresponding sections of the revision. In *Board of Commissioners* v. *Gorman*, 19 Wall. 664, we held that if an execution was issued upon a judgment in the courts of the United States after the expiration of ten days, a *supersedeas* afterwards obtained would prevent further proceedings under the execution, but would not interfere with what had already been done.

Applying this principle to the case in hand, it follows that, as the writ of *mandamus* was rightfully issued and served before the *supersedeas* was obtained, this motion must be denied. *Motion denied.*

UNITED STATES v. BOSTWICK.

1. In this case, no formal lease of the property was executed; but the court holds that the correspondence under which the United States entered into occupancy constituted a contract of letting for one year, with a privilege of three, at a rent of $500 per month, without restriction as to the use to which the property might be put.
2. Unless excluded by the operation of some express covenant or agreement, there results from the relation of landlord and tenant an implied obligation on the part of the latter not to commit waste, nor, by his failure to exercise reasonable care, permit it to be committed.
3. In the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if buildings are accidentally destroyed by fire or otherwise.
4. The destruction of ornamental trees, fences, walls, &c., and the quarrying and removal of stone and gravel, is voluntary waste, within the prohibition of the implied agreement, for which the tenant is answerable.
5. In this case, the property having been rented by the United States "for all purposes," no recovery can be had on account of its use for a small-pox hospital.
6. The obligations of the United States relate to the condition of the premises at the time the term commenced. For damages done before that time by the army engaged in the suppression of the rebellion, no action can be maintained in the Court of Claims.
7. The acceptance, without objection by the lessor, of reduced rates of rent after the expiration of the first year is conclusive evidence of his assent, in consideration of the continued occupancy by the United States, to a modification of the original agreement in that particular.

APPEAL from the Court of Claims.

This was a suit by Thomas R. Lovett, trustee of Mrs. Louisa Fletcher, against the United States, to recover the rent of and for damages to certain real estate and premises situated in the District of Columbia, and known as Kalorama.

The Court of Claims found the following facts: —

Thomas R. Lovett, as trustee of Mrs. Louisa Fletcher, was, on the seventeenth day of August, 1861, seised in fee of said premises, containing about ninety-one acres, a dwelling-house with wings, measuring in all one hundred and fifty by forty feet, a large stable, and a frame building, with a garden, lawns, and walks, a fence all around the premises, and a substantial wall, about a quarter of a mile long, from Rock Creek to the lodge gate on Boundary Street, and trees of various kinds, and shrubbery.

In consequence of application made to him for the lease of the premises to the United States for a hospital, by General Mansfield, Lovett authorized the following writings, marked 1 and 2: —

"No. 1.

"GENERAL, — Inclosed is a note of terms for the mansion and lower grounds of Kalorama.

"The upper grounds contain about seventy acres, which may be occupied by the quartermaster for horses and wagons, or whatever else may be desired, at the rent of $100 per month.

"Respectfully,

"CHARLES F. FLETCHER,

"*For* THOMAS R. LOVETT, *Trustee.*

"To GENERAL MANSFIELD, *B. G. &c.*"

"No. 2.

"KALORAMA, Aug. 17, 1861.

"GENERAL MANSFIELD:

"SIR, — I offer to the government, for the purposes of a hospital, that part of the place known as Kalorama, comprising the house and porter's lodge, together with about thirty acres of land immediately surrounding and including both sides of Rock Creek, bordering the same, upon the following terms: —

"The lease to be for the term of three years, with the privilege to the government to renew the same for three years longer, at the same rent, $450 per month.

"There will be left in the building a portable furnace and hall-stove, for the use of the government. It will be stipulated that the trees and shrubbery on the grounds shall be strictly protected, and any unnecessary injury to the same to be compensated for by the government; the buildings to be kept in repair by the government, and to be left in as good repair as ordinary wear and tear will permit. The grounds having already been occupied by troops, and the fence thereby destroyed, it is expected that the government will renew them, and leave them in good repair at the expiration of the term. Very respectfully, yours, &c.,

"CHARLES F. FLETCHER,

"*For* THOMAS R. LOVETT, *Trustee.*"

Thereafter General Mansfield issued and sent to Lovett the following: —

"HEAD-QUARTERS, DEPARTMENT OF WASHINGTON,

"WASHINGTON, Aug. 17, 1861.

"As soon as vacated, within two weeks the United States will hire the whole property of Thomas R. Lovett, trustee of Mr. Charles F. Fletcher, &c., above, on the following terms, inclusive

of his upper lot, and all his land and privileges, for $500 per month, for the period of one year, with the privilege of keeping it at least three years, if desirable for all purposes.

"MANSFIELD, *B. G., &c.*"

Under the agreement above made the United States entered upon and occupied the said premises specified in General Mansfield's order, from Aug. 23, 1861, to Sept. 30, 1867, inclusive.

For rent of said premises the United States paid to the said Lovett $500 per month, from Aug. 23, 1861, to June 30, 1862; and for each monthly payment the petitioner signed a receipt, the form of which was as follows: —

"*The United States to Thomas R. Lovett, Trustee, Dr.*

"1862. For rent of Kalorama, occupied as hospital, from June 1 to June 30, 1862, at $500 per month . $500.00

"I certify that the above account is correct and just, that the services were rendered as stated, and that they were necessary for the public service. E. E. CAMP, *Captain, A. Q. M.*

"Received at Washington, D. C., the 15th of July, 1862, of Captain E. E. Camp, Assistant Quartermaster United States Army, the sum of five hundred dollars and cents, in full of the above account. THOMAS R. LOVETT, *Trustee.*"

For rent of said premises the United States paid to Lovett $250 per month, from July 1, 1862, to Feb. 1, 1865; and for each monthly payment he signed a receipt, in the following form: —

"*The United States to Thomas R. Lovett, Trustee, Dr.*

"1862. For rent of Kalorama, occupied as a hospital and camp-grounds, from July 1 to Sept. 30, 1862, at $250 per month $750.00

"I certify that the above account is correct and just, that the services were rendered as stated, and that they were necessary for the public service. E. E. CAMP, *Captain, A. Q. M.*

"Received at Washington, D. C., the 9th of October, 1862, of Captain E. E. Camp, Assistant Quartermaster United States Army,

the sum of seven hundred and fifty dollars cents, in full of the above account. THOMAS R. LOVETT, *Trustee.*"

From the 1st of February, 1865, to Sept. 30, 1867, inclusive, the United States paid for rent of said premises $200 per month; and for each payment received a receipt, in the form annexed.

"*The United States to Thomas R. Lovett, Trustee, Dr.*

"1867.

"Sept. 30. For rent of Kalorama, as hospital and camp-ground, from Sept. 1, 1867, to Sept. 30, 1867, one month $200.00

"I certify that the above account is correct and just, that the services were rendered as stated, and that they were necessary for the public service. A. P. BLUNT,

"*Brevet-Colonel & A. Q. M., U. S. A.*

"Received at Washington, D. C., the 30th of September, 1867, of Brevet-Colonel A. P. Blunt, Assistant Quartermaster United States Army, the sum of two hundred dollars and cents, in full of the above account. THOMAS R. LOVETT, *Trustee.*"

While the United States occupied the premises from Aug. 23, 1861, to Sept. 30, 1867, the main house was burned; the flower-garden and shrubbery were destroyed; three and one-half miles of fence torn down; a brick wall fifty feet long, nine feet high, and fourteen inches thick torn down, and the bricks used, partly for pavement and partly for building a lime-house, where the United States put clothes for purifying them. Some sheds were torn down. The part of the house not burned, about fifty feet long, was greatly damaged, and the glass, with the sashes, was carried away. Ornamental and shade trees of various kinds were cut down; a stone wall was taken down, and most of it carried away; and stone quarried and gravel dug from a quarry and a gravel-pit on the premises, and carried away. The premises were left in a dilapidated condition, and the house unfit for occupancy. To restore the building and premises to their condition when leased, reasonable wear and tear excepted, would have cost $20,000.

The stone quarried and carried away by the United States amounted to 2,327 perches, and was worth 25 cents per perch	$581.75
The gravel dug and carried away by the United States amounted to 2,347 yards, and was worth $21\frac{7}{10}$ cents per yard	509.20
The stone wall taken down and carried away amounted to 505 perches, and was worth $3.50 per perch	1,767.00

The extent and valuation of the damage to the part of the dwelling-house not burned, or to other buildings, the number or the value of the trees cut down, the value of the brick wall or fence destroyed, and the disposition of a fire-proof safe, boiler, stove, and heater, were not shown.

Two regiments were, previous to said written contract, encamped by the United States on the northern part of said premises; and thereon and during such occupation, previous to said contract, about fifteen hundred trees were cut down and a portion of the fencing destroyed by the soldiers of said regiments.

All the injuries to said premises during the occupation thereof, or of any part thereof, either previous to or during said written contract, were done by the military forces of the United States engaged in suppressing the rebellion, who were encamped on the premises previous to said written contract, or who occupied them under said contract.

The dwelling-house was used by the United States for a small-pox hospital, and the ground as a camping-ground for soldiers. Seven or eight soldiers who died were buried on the place; and since it was vacated by the United States, Sept. 30, 1867, it has not been rented.

At the time the dwelling-house was burned it was insured by the Ætna Insurance Company and the Firemen's Insurance Company, on two policies of $5,000 each. Those companies adopted as their highest rate of insurance on buildings three-fourths of their cash value. The amount of the insurance, $10,000, was paid to the petitioner for a total loss.

On the 21st of December, 1868, Lovett presented for payment to the United States the following account or bill: —

The United States to Thomas R. Lovett, Trustee, Dr.

1867.			
Oct. 1.	To rent of Kalorama, from Aug. 23, 1861, to		
A¹. A².	Oct. 1, 1867, 73 months, 8 days, at $500 .		$36,645.16
	By cash on account		19,295.16
	Balance		17,350.00
Vo. 1.	Damage to out-buildings		3,300.00
2.	Do. stable		200.00
1 & 2.	Do. lodge		200.00
B. C. D.	Value of stone taken from the quarry, 6,659 pr., at 25 cents		1,664.75
B. C. D.	Value of gravel taken from the pit, 2,347 yards, at 30		704.10
2. 4.	Trees destroyed		800.00
B. D.	Stone wall taken, 505 perches, at $5 . . .		2,525.00
2 5 & 4	1,000 panels of fence		1,000.00
	Fire-proof safe	$60	
	Boiler	80	
	Stove	33	
	Heater	95	
			218.00
			$27,861.85

E. & O. E.

JOHN D. MCPHERSON, *Attorney, &c.*

DEC. 9, 1868.

On Feb. 8, 1870, the following notice was sent to Lovett: —

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"WASHINGTON, D. C., Feb. 8, 1870.

"THOMAS R. LOVETT, Esq., Washington, D. C.:

"SIR: You are respectfully informed that your claim as trustee, &c., of the premises known as 'Kalorama,' in this District, has this day been referred to the third auditor of the treasury for the payment of $21,040.42.

"Very respectfully, your obedient servant,
"By order Acting Quartermaster-General,
"JAMES A. EKIN,
"*Deputy Quartermaster-General,*
"*Brevet Brigadier-General U. S. A.*

"120–103 Claims."

The facts following were requested by the petitioner.

In October, 1867, the claimant made out and presented to the Secretary of War the following claim: —

United States to Thomas R. Lovett, Trustee, Dr.

1867.			
Oct. 1.	To whole amount of rent according to contract, from Aug. 22, 1861, to Oct. 1, 1867, 73 months, 8 days, at $500 per month . .		$36,645.16
	Less amount received, from Aug. 23, 1861, to July 1, 1862, at $500 per month	$5,145.16	
	From July 1, 1862, to Jan. 31, 1865, at $250 per month . . .	7,750.00	
	From Jan. 31, 1865, to Oct. 1, 1867, at $200	6,400.00	
			19,295.16
	Balance		$17,350.00
	To estimated cost of rebuilding burnt portion of mansion	$16,300	
	Less insurance	10,000	
			6,300.00
	To estimated damage to outbuildings and wing, independently of fire		8,300.00
	To damage to stable		200.00
	To damage to lodge		100.00
	To value of stone taken from quarry (2,327 perches)		581.75
	To value of gravel taken from pit (2,777 yards)		833.00
	To damage to hill in consequence of digging gravel		500.00
	To trees destroyed		800.00
	To cost for replacing stone wall on Boundary Street (420 perches)		1,310.00
	To 1,000 panels rail-fence		1,000.00
	To fire-proof safe		60.00
	To copper boiler		30.00
	To hall-stove		33.00
	To portable heater		95.00
			$32,493.25

Which was by the Secretary indorsed as follows: —

(Indorsed:) "28-1-'70. $\frac{120}{103}$ Kalorama. Referred to the Quartermaster-General for investigation and report.

"EDWIN M. STANTON, *Secretary of War.*

"FEB. 12, 1868."

On this claim the Quartermaster-General reports as follows: —

"QUARTERMASTER-GENERAL'S OFFICE,
"WASHINGTON, D. C., Nov. 11, 1869.

"Hon. WILLIAM W. BELKNAP,
"Secretary of War, Washington, D. C.:

"SIR, — I have the honor to return the enclosed claim of Thomas R. Lovett, trustee, &c., for rent and repair of premises known as 'Kalorama,' in this city, and for gravel, stone, &c., stated at $32,493.25, referred to this office from the War Department for further report, in connection with the additional evidence presented, and to invite your attention to the full abstract of the case herein.

"I consider the order of General Mansfield taking possession, and directing a monthly payment of $500, and the fact of the claimant receiving and receipting for this amount, sufficient evidence of a contract or lease, and therefore recommend that rent be paid from Aug. 23, 1861, to Oct. 1, 1867, 73 months, 8 days, at $500 per month, amounting to $36,633.33, subject to the deduction of all sums which were paid the claimant for the use of the premises during United States occupancy.

"It is evident from the abstract that injustice was done the claimant in the previous recommendation of Acting Quartermaster-General Rucker, as to the allowance for gravel taken and used.

"I recommend that Mr. Lovett be paid for 2,777 yards (60,250 bushels) of gravel, at the same rate as that allowed by the War Department in the 'Dennison' case, viz., one (1) cent per bushel, amounting to $602.50.

"So much of General Rucker's recommendation as is for repairs, $2,300, and for 2,327 perches of stone, at 25 cents per perch, amounting to $581.75, I recommend to be adhered to.

"Very respectfully, your obedient servant,

"J. C. MCFERRAN,
"*Deputy Quartermaster-General,*
"*Acting Quartermaster-General.*

This report being examined by an officer of the War Department, he made a report to the Secretary, concluding with the following recommendation: —

"As to the items mentioned in Mr. Lovett's proposition as being in the house, a fire-proof safe, copper boiler, hall-stove, &c., and for which an aggregate charge of $218 is made, Messrs. Allen and Yeatman say that they are unable to determine whether the responsibility for these rests with the Quartermaster's or Medical Department, and the Quartermaster-General does not ask authority to pay them. It is considered, however, that, the responsibility of the Medical Department being a matter of doubt, they should be paid for by the same Department as the rest.

"It is recommended, therefore, that the Acting Quartermaster-General be directed to make the payments recommended in his letter of Nov. 11, 1869, and to pay, in addition, the sum of $218 for the items last referred to."

Upon which the Secretary of War indorsed as follows: —

"Approved:

"WILLIAM W. BELKNAP, *Secretary of War.*"

Whereupon the Quartermaster-General wrote to Lovett as follows: —

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"WASHINGTON, D. C., Feb. 8, 1870.

"THOMAS L. LOVETT, Esq., Washington, D. C.:

"SIR, — You are informed that your claim as trustee, &c., of the premises know as 'Kalorama,' in this District, has this day been referred to the Third Auditor of the Treasury for the payment of $21,080.42.

"Very respectfully, your obedient servant,

"By order of the Acting Quartermaster-General,

"JAMES A. EKIN,
"*Deputy Quartermaster-General,*
"*Brevet Brigadier-General, U. S. A.*

"Allowed on request of Lovett. E. G. L."

The accounting officers of the Treasury disapproved of the recommendation of the War Department, and rejected the claim, except as to the sum of $5,159.99, of which action the claimant was duly advised.

The following letter was received by the Quartermaster-General: —

"WASHINGTON, Jan. 31, 1868.

"To Brig.-Gen. RUCKER, A. Q. M. G., Washington, D. C.:

"GENERAL, — In reference to the accompanying account, I would respectfully state that the place known as 'Kalorama,' lately occupied by the government (a plat of which accompanies this communication), comprises about ninety acres of land. It was hired on the seventeenth day of August, 1861, by Brigadier-General Mansfield, on the part of the government, as a hospital and camp-grounds, by written contract, at a monthly rent of $500, of which contract the following is a copy: —

"'HEAD-QUARTERS, DEP'T OF WASHINGTON,
"'WASHINGTON, Aug. 17, 1861.

"'As soon as vacated, within two weeks the United States will hire the whole property of Thomas R. Lovett, trustee of Mr. Charles F. Fletcher, &c., above, on the following terms, inclusive of his upper lot and all the land and privileges, for $500 per month, for the period of one year, with the privilege of keeping it at least three years, if desirable for all purposes.

"'MANSFIELD, *Brigadier-General, &c.*'

"Possession of the premises was given on the twenty-third day of August, and, on the tenth day of October following, the contract was filed in the office of Captain E. E. Camp, A. Q. M., and by him entered on the roll by order of Brigadier-General Van Vliet.

. . . . . .

"I am, respectfully,

"THOMAS R. LOVETT,
"Trustee, &c., Mount Airy, Philadelphia, Pa."

As conclusions of law, the court found, —

That the letter of Charles Fletcher, for Thomas R. Lovett, trustee, dated Aug. 17, 1861, addressed to General Mansfield, as qualified by General Mansfield's reply, dated Aug. 17, 1861, and with that made a contract of lease subsequently acted on by the parties, by the terms of which the United States were bound to repair the premises in case of their damage by fire, and to release them in as good repair as ordinary wear and tear would permit.

That under said contract and under the tenancy between the parties the United States were liable for injuries to the premises, in the nature of waste.

That the claimant is not entitled to damages for the use of the premises as a small-pox hospital by the United States.

That the claimant is barred of all claims for reductions of rent by his receipts in full given for such rents.

That the United States were not entitled to be credited with $10,000 paid to the claimant by insurance companies on policies of assurance obtained and paid for by him for his benefit.

That the report of the officers of the Quartermaster's De partment, that $21,040.42 were due to the claimant, approved by the Secretary of War, and ratified by the War Department to the claimant, was not binding and conclusive on the United States.

That the claims of the petitioner for loss by fire and dam age by acts of waste were not barred by the Statute of Limi tations.

There was a judgment of $20,000 in favor of the claimant; from which both parties appealed to this court.

Lovett having died pending the suit, Charlotte Bostwick, his administratrix, was substituted in his stead.

Mr. Assistant Attorney-General Smith, for the United States.

The contract under which the United States entered into the occupancy of the premises was completed by the verbal or implied assent of Lovett to the proposition, contained in General Mansfield's letter of Aug. 17, 1861. Lovett's letter of that date was a mere offer, not assented to, and constitutes no contract; for there must be not only a proposal, but an acceptance thereof. 1 Story Contr., sect. 490; *Hazard* v. *N. E. Ins. Co.*, 1 Sumn. 225; *Andrews* v. *Garrett*, 6 C. B N. S. 269; *Tuttle* v. *Love*, 7 Johns. 471.

Where a proposition is made, with certain conditions or limitations, the acceptance must correspond to it in terms; otherwise, it is a new proposition, requiring the subsequent assent of the other party to render it binding. 1 Story, Contr., sect. 503; *Slaymaker* v. *Irwin*, 4 Whart. 369; *Honeyman* v. *Marryatt*, 6 Ho. of L. Cas. 112.

Lovett, in his letter of Jan. 31, 1868, to General Rucker, expressly declares General Mansfield's letter of Aug. 17, 1861, to be the contract under which the premises were occupied.

General Mansfield's letter was not a lease, but a mere proposition to occupy, which, when accepted, constituted a verbal

letting, and, under the first section of the Statute of Frauds, a tenancy at will.

There was no liability to rebuild in case of fire. Taylor's Land. & Ten., sects. 101, 146; *Leach* v. *Thomas*, 7 Car. & P. 327; *Horsefall* v. *Mather*, Holt, 7; *Brown* v. *Crump*, 1 Marsh. 567; *Rook* v. *Worth*, 1 Ves. Sen. 462; *Wainscott* v. *Silvers*, 13 Ind. 497; *Warner* v. *Hitchins*, 5 Barb. 666.

The claimant is bound by his assent to the reduction of the rent, especially as the government continued in optional occupancy, upon the faith of his acquiescence. *United States* v. *Clyde*, 13 Wall. 35.

As the government was not liable to rebuild, it was not liable to make repairs.

General Mansfield's proposition was to take the property "for all purposes," — a term broad enough to include a small-pox hospital, or any other use to which the government might see fit to put it.

Mr. J. D. McPherson, for Bostwick.

The court below did not err in taking the whole correspondence to constitute the contract. Addison, Contr., c. 1, sect. 2, p. 41.

If one enter under an agreement for a lease, and pay rent, the relation of landlord and tenant arises, and the tenant holds under the terms of the agreement, as if embodied in a lease. 1 Platt on Leases, c. 4, sect. 4, pp. 611, 612.

The mere fact that the defendant, modifying certain terms, restates them, does not exclude others not modified or restated.

Out of the relation of landlord and tenant there arises on the part of the tenant an implied contract to use the leased premises in a tenant-like manner. *White* v. *Nicholson*, 4 Man. & Gr. 95; 43 E. C. L. 58; *Nave* v. *Berry et al.*, 22 Ala. 382; Addison, Contr., sect. 711.

A general covenant to repair is binding on the tenant, whatever may be the cause of dilapidation. 2 Platt on Leases, p. 186; *Bullock* v. *Demmet*, 6 T. R. 650; *Buckworth Cœnal Co.* v. *Pritchard*, id. 750; *Phillips* v. *Stevens*, 16 Mass. 245; 3 Pars. Contr., c. 8, p. 503; Taylor's Land. & Ten., sect. 343; Addison, Contr., sect. 711.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In the determination of this cause, it is necessary at the outset to ascertain definitely the terms of the contract under which the United States occupied the property of the petitioner. On the one hand, it is claimed that the proposition of Mr. Lovett was accepted by General Mansfield with modifications, and that all the stipulations suggested by him are included in the contract as finally entered into, unless modified or rejected in terms by the note of General Mansfield. On the other hand, it is contended by the United States that the note of General Mansfield, instead of being an acceptance of the proposition, was a rejection of it, with an offer of new terms, which, when acceded to by Mr. Lovett, embraced all there was of the contract as made. The latter, we think, is the true construction of the correspondence. We know that, when a contract is entered into by correspondence, the whole correspondence must be considered in determining what the parties have agreed to; but we also know that both parties must assent to a proposed agreement before either is bound by it. Here General Mansfield has nowhere indicated a willingness to accept any of the terms offered him, but, rejecting all, has made a new offer of his own. No reference whatever is made by him to any of the special stipulations suggested by Mr. Lovett. All these are laid aside, and he states the terms upon which the United States will hire the property. The words "as above," where they occur in his note, are used to designate the property, not to extend the offer. In short, Mr. Lovett proposed his terms, and General Mansfield his. Mansfield's were accepted, but Lovett's were not.

This being the case, the contract is one by which Mr. Lovett agreed to let, and the United States to hire, the premises described for the term of one year, with the privilege of three, at a rent of $500 a month, and without restriction as to the use to which the property might be put. The United States agree to nothing in express terms, except to pay rent and hold for one year.

But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unneces-

sarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." Com. Land. & Ten. 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford* v. *Dunnett*, 7 M. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. *Horsefall* v. *Mather*, 7 Holt, 9; *Brown* v. *Crump*, 1 Marsh. 569.

There are in this contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to use the property for any and all purposes, but were bound to so conduct themselves in such use as not to cause unnecessary injury. Whatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant, while using the property, will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim *sic utere tuo ut alienum non lædas*. If he fails in this, he violates his contract, and must respond accordingly.

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon.

Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record.

1. As to the rent. The United States hired for a year absolutely, at the agreed rent of $500 a month, and occupied during

the whole of that term. They therefore, by their agreement, were expressly bound to pay rent at that rate for the whole of the year. This they have paid in full to June 30; but after that, until the end of the year, Aug. 23, 1862, their payments have been only at the rate of $250 a month. Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration. It is not found that there was any new consideration in this case. All that appears is, that an account was made out for the rent from July 1 to Sept. 30, at the new rate, and that this account was receipted by Mr. Lovett after payment. Upon this finding, therefore, in the absence of any thing more, showing that the reduction in the rent of the first year was part of the agreement to continue the lease beyond the year upon new terms, the petitioner will be entitled to judgment for rent at the rate of $250 a month, from June 30 to Aug. 23, 1862, that being the balance remaining after deducting payments made.

After the end of the first year the case is different. The United States were not bound absolutely to keep the premises for a longer term than one year. After that, they could make new terms, or leave. The acceptance by Mr. Lovett of the reduced rates from that time, without objection, is conclusive evidence of his assent to a modification of the original agreement in this particular, in consideration of the continued occupancy by the United States. Having thus secured the occupancy, he cannot now object to the agreement under which it was obtained.

2. As to the use for a small-pox hospital. Mr. Lovett originally offered the property to the government "for the purposes of a hospital;" and all the receipts for the rent expressly state that the property was being so occupied. No objection to such an occupancy was ever made; and, if there were nothing more, the presumption would be that the lessor expected the property was to be used for any and all hospital purposes that the necessities of the government for the time being might require. But the note of General Mansfield is broad enough to cover such an occupancy, for he expressly states that the hiring is to be "for all purposes." No recovery can be had upon this specification of claim.

3. As to the destruction of a part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that these premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account.

4. The destruction of the trees and fences, and the digging and carrying away of gravel and stone. Whatever injury was done to the property during the occupation previous to the agreement for the lease cannot be recovered for in this action. Mr. Lovett's proposition included an undertaking on the part of the United States to make good this loss; but his proposition was not accepted, and the case stands as if it had never been made. The obligations of the United States under the lease, as to the preservation of the property, relate only to the condition of the premises as it was when the term commenced. All damage done before that is clearly "damages . . . by the army and navy . . . engaged in the suppression of the rebellion," and on that account not recoverable in the Court of Claims. 13 Stat. 381. But damage after the lease commenced, and while the United States were actually in possession under it, occupies a different position. That comes within the contract by which the rights of the parties in this action are to be determined. As has been seen, that does not bind the United States to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use. It binds them not to commit waste, or suffer it to be committed. If they fail in this, they fail in the performance of their contract, and are answerable for that in the Court of Claims, which has jurisdiction of "all claims founded upon any contract, express or implied, with the government of the United States, which may be suggested to it by a

petition filed therein." Rev. Stat. § 1059; 10 Stat. 612, § 1. If there had been in this lease an express agreement to repair, certainly it could not have been successfully claimed that the Court of Claims would not have had jurisdiction to award damages for a failure to rebuild after the fire, even though the fire was caused by the soldiers while in the hospital for treatment. But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract.

It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action. The amount of this damage has not been found

5. The account, as stated in the quartermaster-general's office. This does not conclude the United States. It was a mere adjustment of the accounts by one of the bureaus in one of the departments of the government, rejected by the accounting officers of the treasury, and never paid. Certainly this can have no binding effect upon the United States.

The judgment must be reversed, and the cause remanded, with instructions to render judgment against the United States for the rent of the premises from June 30 to Aug. 23, 1862, at the rate of $250 per month, and for the damages done to the property other than the destruction of the house by fire during the occupation of the United States under their lease, except to the extent that the same necessarily resulted from the use of the premises by the soldiers of the army of the United States for the purposes of a hospital and camp-ground, and it is

So ordered.

COUNTY OF LEAVENWORTH v. BARNES.

1. This court adopts the decision of the Supreme Court of Kansas, affirming the validity and binding effect of an act of the legislature of that State, approved Feb. 10, 1865, entitled "An Act to authorize counties and cities to issue bonds to railroad companies," although the yeas and nays were not called and entered on the journals of the respective houses on the final passage of the bill, and the enrolled bill was not signed by the presiding officer of the senate.
2. Where the question of subscribing to the stock of a railroad company was, prior to the passage of that act, duly submitted to the qualified voters of the county, who voted to subscribe stock and issue bonds therefor, the board of county commissioners was, by that act, authorized to make the subscription, and issue bonds not exceeding the amount provided in the first and third sections thereof.
3. The bonds issued by the county of Leavenworth, Kansas, bearing date July 1, 1865, and reciting that they are issued in payment of the subscription of said county to the capital stock of the Leavenworth and Missouri-Pacific Railroad Company, under the provisions of the act of the legislature of Kansas, entitled "An Act to authorize counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, are, in the hands of a *bona fide* holder for value, valid and binding upon the country.

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. J. W. English* for the plaintiffs in error, and by *Messrs. Stillings & Fenlon* for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought upon certain bonds and coupons issued by the county of Leavenworth, Kansas.

It is found by the judge, who tried the cause without a jury, that the bonds were issued by the county, and that the plaintiff below was the owner and holder, and purchased them without actual notice of the defences set up, and for value paid.

The defences to the recovery upon the bonds resolve themselves into the following: —

First, The bonds recite that they are issued under the provisions of the act of the State of Kansas, approved Feb. 10, 1865, entitled "An Act to authorize counties and cities to issue bonds to railroad companies."

They bear date of July 1, 1865, and are payable on the first day of July, 1875.

This act authorized the counties to make subscription to the capital stock of a railroad company, and to issue its bonds in payment therefor, payable within thirty years, at a rate of interest not exceeding seven per cent. A previous assent of the qualified electors of the county, at an election, of which twenty days' notice should be given, was required.

It is contended that without this act there was no authority in the county to issue the bonds in suit, and that the act was never legally passed. The objection is that the yeas and nays were not called and entered on the journal, on the final passage of the bill; and, again, that the enrolled bill was not signed by the presiding officer of the senate.

The recent decision upon this identical statute by the Supreme Court of Kansas, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well-settled rules, will be followed by this court. The question is discussed at much length, many local authorities in support of their conclusion are cited, and the act is held to have been legally passed, and to be a binding act. We must hold in accordance with this decision.

Second, It appears by the record that on the second day of January, 1865, the board of county commissioners called an election for the twenty-first day of that month, for the submission to the electors of the question of subscribing to the stock of the Leavenworth and Missouri-Pacific Railroad Company; that an election was held on that day, at which seven hundred and eighty-four votes were cast in favor of the subscription, and one hundred and eleven against it; that on the eighteenth day of April the chairman of the board was directed by the board to make the subscription; and that on the first day of July the bonds were issued in payment thereof.

It is now objected that the bonds are invalid, for the reason that the only vote taken by the electors of the county was before the passage of the act authorizing it. The law in question appears, from the printed volume of the statutes of Kansas, to have been approved on the tenth day of February, 1865.

and to have been published on the fourteenth day of the same month.

The act we are considering authorizes the counties into, from, or near which any railroad is or may be located, to subscribe to the capital stock thereof, and to issue its bonds in payment of such subscription. It proceeds to say: "But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or some special election, to be called by the board of county commissioners by first giving twenty days' notice in some newspaper published and having general circulation in the county. . . . If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same."

The road in question was located and built in and through the county of Leavenworth.

The fourth section of the act contained this provision: —

"In case the board of commissioners of any such county . . . have heretofore submitted to the electors of such county the question of issuing bonds to any railroad company, and at such election such electors voted to issue such bonds, such board are hereby authorized to issue such bonds and subscribe for stocks not exceeding the amount as provided in the first and third sections of this act." Stat. Kan. 1865, p. 42.

In the present case, a majority of the electors voting declared themselves in favor of the subscription and issue of the bonds. This is all that is required either by the first or the fourth section. The same rule is intended to be applied in each case.

This is an explicit authority from the legislature to the county board to adopt any previous expression of the electors of their willingness to make such subscription. It is conclusive upon the point under consideration.

Third, It is objected, again, that the bonds were issued to the Leavenworth and Missouri-Pacific Railroad Company, whereas it is alleged that no such company was in existence on the twenty-first day of January, 1865, when the election was held, or on the first day of July, when the bonds were issued.

This company was organized in 1860, under the name of

the Missouri River Railroad Company, and on the 18th of April, 1865, it consolidated with another company, increased its capital, and changed its name to that of the Leavenworth and Missouri-Pacific Railroad Company. We suppose this to have been authorized by the statutes of Kansas. Laws 1862, p. 768. We are certainly of opinion that when the parties interested in the two companies are content; when the newly named company has been in operation for ten years; when the county has received and held its stock until 1869; when the same was sold by the county by authority of the legislature, — it is not competent for such a contracting party to say that there was an irregularity in the organization of the company. Bigelow on Estoppel, 464; *Moran* v. *Commissioners*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 How. 400; *Pendleton* v. *Amy*, 13 Wall. 297.

There are some other objections made, but none of them are serious in their character. *Judgment affirmed.*

UNITED STATES v. CLARK.

1. The act of May 9, 1866 (14 Stat. 44), extending the jurisdiction of the Court of Claims, does not dispense with the existing rules regulating appeals from that court.
2. In cases to which that act applies, the Court of Claims should set forth in its finding of facts the amount of loss, if any, which the petitioner has sustained.

APPEAL from the Court of Claims.

On the 12th of April, 1873, Clark filed his petition in the Court of Claims praying relief from responsibility, under the act of May 9, 1866, 14 Stat. 44, on account of the loss, by robbery, of funds to the amount of $15,979.87 belonging to the United States, and in his hands as a paymaster in the army. The United States pleaded the general issue and the Statute of Limitations.

The court found the facts as follows: —

1. On the 6th April, 1865, the claimant lost, by robbery, while in the line of his duty as assistant paymaster in the army

at Franklin, Texas, a package of government funds. The package was in his official safe at his quarters, and the loss was without fault or neglect on the part of the officer.

2. The claimant, after duly reporting the loss, and making known the facts to his superior officers, credited himself in his next account-current as follows: "Amount lost by robbery of safe at Franklin, Texas, $15,979.87." This item of credit was not acted upon by the accounting officers of the treasury until the final revision of his accounts, on the 6th of November, 1871, when it was disallowed, and charged to him as a balance on hand.

3. The robbery was committed in the daytime, by forcibly breaking into the claimant's quarters, during his temporary absence, and then forcibly breaking into the government safe, in which the funds were. Two persons were apprehended and tried by military commission held at the head-quarters of the Department of New Mexico, on the 5th of June, 1865. On the trial the claimant was a witness, and testified as to the amount of the funds stolen. The commission found the prisoners guilty. Its proceedings were duly approved, and its sentence carried into effect.

The claimant, at the time of the robbery, had no clerk or assistant. It appears, from other testimony, that a package of money was in the safe, but the precise amount thereof was known to no person but the claimant. He was of good character, personally and officially, and had always kept regular and exact accounts of the funds in his official custody, and had made due returns in regard to, and properly accounted for, the same. He immediately reported to his superior officers that the funds in that safe were $15,979.87, which was the amount of the loss appearing on his subsequent official reports, and charged against him as deficiency on the final revision and settlement of his accounts by the accounting officers of the treasury.

4. On the 17th of February, 1873, a suit was instituted by the United States, in the Circuit Court of the United States for the first circuit, on the official bond of said claimant, which suit is still pending, to recover the sum of $20,000, claimed to be due from him thereon.

Upon the facts found the court decided as conclusions of law:—

1. The court having ascertained the facts of the loss in this case, and that it was without fault or neglect on the part of the claimant, may render a decree in his favor, as directed by the statute, though the evidence of the amount of the funds lost was entirely circumstantial.

2. The suit having been brought within six years after the claimant's accounts were settled at the treasury, in which he had charged the United States with the amount of the loss, and within six years after such item of credit for the funds so lost was first acted upon by the accounting officers, and consequently within six years from the time when the officer was first held responsible for such loss, the suit is not barred by the Statute of Limitations, though more than six years elapsed between the loss and the bringing of the suit.

Judgment having been rendered for the claimant, the United States appealed to this court.

Mr. Assistant Attorney-General Smith for the appellant.
Mr. Charles E. Pike, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Our rules regulating appeals from the Court of Claims require that the record shall contain, among other things, "a finding by the Court of Claims of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them, and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record." Rule 1, sect. 2.

The act of Congress under which this action was prosecuted does not dispense with these requirements. The Court of Claims should, therefore, have found, among other things, the amount of the loss which had been sustained. It is stated in the judgment as entered in form, and alluded to in the opinion of the court, but is entirely omitted from the special finding, which is to be in the nature of a special verdict. It is our

duty to apply the law to the facts as found, and not to decide upon the weight of the evidence.

Upon the facts set forth in the special finding this judgment cannot be sustained, because of the omission to state the amount of the loss. In our action upon the appeal we do not look beyond the finding.

Judgment reversed on account of an insufficient finding, and cause remanded for such further proceedings as law and justice may require.

STORM v. UNITED STATES.

1. Alleged errors, not presented by a bill of exceptions, nor otherwise apparent on the face of the record, are not the proper subjects of re-examination by an appellate tribunal.
2. Defendants who have actually received the consideration of a written agreement cannot, in an action brought against them for a breach of their covenants, set up that the agreement did not bind the plaintiff to perform his covenants, provided it appears that he has performed them in good faith and without prejudice to the defendants.
3. Questions propounded to a witness, on his cross-examination, merely to ascertain the names of persons whom a party may desire to call as witnesses to disprove the case of the opposite party, may be excluded; and it is within the discretion of the presiding judge to determine, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination-in-chief, to what extent a cross-examination, with a view to affect his credibility, shall be allowed.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. Quinton Corwine* for the plaintiff in error, and by *Mr. Assistant Attorney-General Smith* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Errors of the Circuit Court resting in parol cannot be re-examined in this court by writ of error. Instead of that, the writ of error addresses itself to the record; and the rule is, that, whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of

facts, or by demurrer, the error is open to re-examination and correction.

Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment, or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions. *Suydam* v. *Williamson*, 20 How. 433.

Two of the defendants, to wit, Storm and Shrader, entered into a written contract with the assistant quartermaster of the army, acting in behalf of the United States, to deliver at the several places therein mentioned, in and about the harbor of San Francisco, in such quantities and such monthly proportions as the quartermaster should determine, 1,000,000 pounds of barley, 1,000,000 pounds of oats, 2,000,000 pounds of hay, called oat hay, and 500,000 pounds of straw; it being stipulated that the contractors should receive, as payment for the supplies delivered and accepted under the contract, the following prices, in gold coin, or equivalent in legal-tender notes; to wit, $10.65 for each 1,000 pounds of barley, $12.65 for each 1,000 pounds of oats, $5.90 for each 1,000 pounds of hay, and $4.30 for each 1,000 pounds of straw.

Forage and straw to be delivered, it was stipulated, should be of the best quality in the market; and if, in the opinion of the commanding officer at the place of delivery, it was unfit or of a quality inferior to that prescribed by the contract, it was stipulated that a survey should be held by one or more officers, to be designated by the commanding officer, and that the board of survey should have power to reject the whole, or such portions of the same as appeared unfit for issue, or of a quality inferior to the contract.

Supplies of the kind were to be not only of the best quality in the market, but clean and fit for immediate use. In case of failure or deficiency in quantity or quality delivered, power was vested by the contract in the assistant quartermaster or his successor to supply the deficiency by purchase in open market; and the contract provides that the contractors shall pay the difference in cost in gold coin, or its equivalent in legal-tender notes.

Public contractors of the kind are required to give bond with sureties to the United States for the faithful performance of their contracts; and the declaration shows that the contractors in this case gave bond to the United States, with the other two defendants as sureties, in the sum of $12,000, conditioned that, if the contractors observe, perform, fulfil, and keep the covenants and stipulations of their written agreement, the obligation shall be void; otherwise, to remain in full force and virtue.

Breaches of the conditions occurred, as the United States alleged, and they instituted the present action of debt on the bond against the principals and their sureties. Distinct breaches of the agreement were assigned in the declaration, as fully appears in the record.

Service was made, and the defendants appeared and filed an answer, setting forth the following defences: 1. They deny all and singular the allegations of the declaration. 2. That at the close of December, 1870, there was due and owing to the contractors under the agreement the sum of $1,476.43, for supplies furnished and accepted by the commanding officers at the respective places of delivery. 3. That the contractors up to that time and during that month had delivered all such quantities and proportions of forage and straw as were required by the assistant quartermaster, and of the best quality in the market. 4. That the assistant quartermaster during the whole of that time had funds on hand to pay and discharge the full amount due to the contractors, as contemplated by the agreement. 5. That the quartermaster wrongfully refused to pay the amount due and owing to the contractors, or any part thereof. 6. That the contractors, in consequence of such wrongful refusal and neglect to pay and discharge the amount due and owing to them, on the 3d of January, 1871, personally notified the assistant quartermaster that they elected to treat the agreement as rescinded and abandoned, and that they did not intend to furnish any more supplies under the same.

Subsequently the parties went to trial, and the verdict and judgment were for the plaintiffs, in the sum of $2,615.40. Exceptions were duly filed by the defendants, and they sued out a writ of error, and removed the cause into this court.

Since the case was entered here, the defendants below have

filed a brief, as required by the rules of the court; but it does not contain either a statement of the case or an assignment of errors. Such a party, under such circumstances, is not entitled to be heard; but inasmuch as the plaintiffs below have filed a printed brief in the case, without objecting that the defendants have not complied with the twenty-first rule, the court will proceed to examine the questions presented in the bill of exceptions exhibited in the record.

Sufficient appears there to show that the plaintiffs offered the described agreement in evidence to sustain the issues on their part, and that the defendants objected to the introduction of the same, insisting that the agreement was not mutually obligatory, that it was given without consideration, and that it was inoperative and void; but the court overruled the objection, and the agreement was read in evidence to the jury.

Evidence was also introduced by the plaintiffs to prove the quantity and value of the grain, forage, and straw bought in open market by the plaintiffs, by reason of the failure of the defendants to deliver the quantity and quality which they agreed to furnish, in order to show the difference between the contract price and the price paid by the plaintiffs in the open market, and the consequent loss to the plaintiffs, as alleged in their complaint. Inquiries were made of the witness as to the quantities and qualities of the supplies so purchased in behalf of the plaintiffs during the three months next following the time of the attempted rescission of the agreement by the defendants, and the witness gave the price paid for each parcel, and added, that the prices paid were the regular market prices in gold coin, and perhaps a little less than he charged to other customers. He stated, on cross-examination, that sometimes, when he did not have the supplies wanted on hand, he went out and purchased what was necessary to fill the order, and that he usually filled the orders on the same or the following day.

Without entering fully into the details of the testimony, it is proper to remark that he testified that he furnished 69,008 pounds of oats, 77,518 pounds of hay, and 25,789 pounds of straw before the month closed in which the defendants gave the notice of their intention to rescind the contract. In the

course of his examination-in-chief the witness gave the name of a firm of whom he bought some hay to fill some one of the orders, and the defendants inquired of whom he purchased the quantity of oats charged to the United States in his account; to which interrogation the plaintiffs objected, and the court sustained the objection and excluded the question.

Due exceptions were taken to the preceding rulings, and the defendants asked the witness if he did not commute with some of the subordinate officers for some portion of the forage to which they were entitled, paying them in money instead of forage, grain, or straw; and, if so, he was asked to state what quantity of such supplies were charged on his books during those three months as having been purchased in open market, which were not so purchased, but were commuted by the witness with the officers, paying them money instead of delivering the required supplies; to which the witness replied that he could tell by looking at his books. He was then requested by the defendants to look at his books and to state what amount of such supplies, within that period, was charged by him which was not purchased in open market and delivered to the United States. Prompt objection was made to the question as irrelevant and immaterial, and it was excluded by the court.

Testimony, undisputed and uncontradicted, was introduced, showing that during the first six months of the year the quartermaster's requisitions for oats, barley, hay, and straw for the military posts named in the agreement were not in excess of the quantity prescribed by law, nor in excess of the quantity required in the requisitions and estimates of the post quartermasters, and that the United States paid for the quantity estimated in such requisitions and no more, and that such payments were only made after receipts and vouchers were received from the proper officer at the military post, showing to the satisfaction of the quartermaster that the requisition had been filled as in the ordinary and usual course of business of the quartermaster's office.

Enough has already been remarked to show that the action is an action of debt founded on the bond given by the defendants to secure the faithful performance of covenants contained in their previously described written agreement. Reference

has already been made to all the exceptions taken by the defendants to the rulings of the court during the trial before the jury; but it is also objected in argument here that the bond described in the complaint was not produced at the trial, and that no copy of it was ever filed in the case. Such an objection, if it had been made in the court below, might have been available for the defendants, unless the plaintiffs had overcome it by producing the instrument, or by showing its loss and due search for it without success, and had offered secondary proof of its contents. Parol proof of the contents of a lost instrument of the kind is admissible, provided it appear that proper search has been made for it without success.

Had the defendants intended to insist that the bond should be given in evidence, they should have made that intention known at the trial; and, if not given in evidence, they might have requested the court to direct a verdict in their favor, and, in case their request had been refused, they would have had the right to except to the ruling of the court in refusing their request for instruction. Nothing of the kind was done; and, for aught that appears in the record, it may be that the bond was given in evidence, or, if not, that the defendants waived the right to require its production.

Errors apparent in the record, though not presented by a bill of exceptions, may be re-examined by writ of error in an appellate tribunal; but alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not the proper subjects of re-examination by writ of error in this court.

Parties dissatisfied with the ruling of a subordinate court, and intending to seek a revision of the same in the Appellate Court, must take care to raise the questions to be re-examined, and must see to it that the questions are made to appear in the record; for nothing is error in law except what is apparent on the face of the record by bill of exceptions, or an agreed statement of facts, or in some one of the methods known to the practice of courts of error for the accomplishment of that object. *Suydam* v. *Williamson*, 20 How. 433; *Garland* v. *Davis*, 4 id. 131; Steph. on Plead. 121; *Slacum* v. *Pomeroy*, 6 Cranch, 221; *Strother* v. *Hutchinson*, 4 Bing. N. C. 83.

Two additional remarks should be made respecting the written agreement before proceeding to examine the questions presented in the bill of exceptions: 1. That it was duly executed by the assistant quartermaster and the contractors, under the hand and seal of the respective parties. 2. That it contains the provision that it "may be terminated at such time as the quartermaster-general may direct," and that it is made subject to the approval of the department and division commanders.

Substantial breaches of the covenants of the agreement having occurred, the United States brought suit on the bond given to secure its faithful performance; and, when the United States offered the agreement in evidence to support the issues on their part, the defendants objected to its admissibility, insisting that it is a *nudum pactum;* that it appears on its face that it might have been terminated at any time at the election of the plaintiffs; that it is not mutually binding, and that, inasmuch as it is wanting in that respect, it is without consideration, and is inoperative and void.

Though no such error is assigned in this court, still it is obvious from the course of the argument exhibited in the brief that the defendants intend to maintain the same proposition in this court. Attempt was not made to invalidate the bond in that respect in the court below, nor is any such attempt made here by the defendants. What they do attempt to show is, that the agreement is inoperative, because it contains the provision that it may be terminated at such time as the quartermaster-general may direct, and in consequence of the provision that it is made subject to the approval of the department and division commanders.

Beyond doubt, the written agreement went into operation; and it is not even suggested that the department and division commanders ever expressed any disapproval of its terms and conditions, nor does the record furnish any evidence to raise a doubt that it was fully approved by all whose assent was necessary to give it a binding obligation. Suppose it to be true that the quartermaster-general might terminate it, if he should see fit, it is a sufficient answer to the suggestion to say, that he never did interfere in the matter, and that the contract con-

tinued in full force and operation throughout the whole period for which the necessary supplies were purchased by the United States in open market.

Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say, that the agreement did not bind the plaintiff to perform the promises on his part th sin contained, provided it appears that the promises in question have, in fact, been performed in good faith, and without prejudice to the defendant. Addison on Contr. (6th ed.) 15; *Mo.ton* v. *Burr*, 7 Ad. & Ell. 25.

Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. Contracts of guaranty may fall under that class, as when a person solicits another to employ a particular individual as his agent for a specified period, and engages that if the person addressed will do so, he, the applicant, will be responsible for the moneys the agent shall receive and neglect to pay over during that time. The party indemnified in such a case is not bound to employ the party designated by the guarantor; but if he do employ him in pursuance of the promise, the guaranty attaches and becomes binding on the party who gave it. *Kennaway* v. *Trelcavan*, 5 Mees. & W. 501.

Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfil their respective stipulations. *Miles* v. *Blackall*, 11 Ad. & Ell. N. S. 365; *Emerson* v. *Slater*, 22 How. 35.

Such a defence could not be sustained, even if the action was upon a simple contract; but the agreement here is under seal, and the action is an action of debt founded on the bond given to secure the performance of the agreement; and it is an elementary rule, that a bond or other specialty is presumed to have been made upon good consideration, so long as the instrument remains unimpeached. Taylor, Evid. (6th ed.) 103; *Lowe* v. *Peers*, 4 Burr. 2225; *Dorr* v. *Munsell*, 13 Johns. 431.

Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. *Parker* v. *Parmele*, 20 Johns. 134; 1 Smith, Lead. Cas. (7th Am. ed.) 698; 1 Chitty on Contr. (11th Am. ed.) 20; *Paige* v. *Parker*, 8 Gray, 213; *Wing* v. *Chase*, 35 Me. 265; 2 Bl. Com. 446; *Fallowes* v. *Taylor*, 7 Term, 473.

Seasonable exception was taken by the defendants to the ruling of the court, excluding the question propounded to the witness called by the plaintiffs, of whom he purchased the quantity of oats which he furnished to the United States. Three grounds are suggested to show that the defendants were entitled to have an answer: 1. That the answer might have affected the credibility of the witness. 2. That the defendants, if the name of the seller of the oats had been given, might have called him as a witness, and perhaps might have proved by him that the price paid was not as great as represented, or that a less quantity than that charged had been delivered. 3. That the answer might have shown that persons had an interest in the sale of the oats who are prohibited by the contract from having any share in furnishing such supplies.

None of the reasons assigned to support the exception are entitled to any weight, when considered in connection with the explanations given in the bill of exceptions. Evidence of an undisputed character had previously been introduced, showing that the requisitions for such supplies were not in excess of the quantity prescribed by law, and that the United States did not purchase and pay for any greater quantity than that specified in the requisitions, and that the purchases were made in the open market, and that the prices paid did not exceed the fair market value of supplies purchased.

Litigants ought to prepare their cases for trial before the jury is empanelled and sworn; and, if they do not, they cannot complain if the court excludes questions propounded merely to ascertain the names of persons whom they may desire to call as

witnesses to disprove the case of the opposite party. Courts usually allow questions to be put to a witness to affect his credibility; but it is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination shall be allowed. *Sturgis* v. *Robbins*, 62 Me. 293; *Prescott* v. *Ward*, 10 Allen, 209; *Wroe* v. *State*, 20 Ohio St. 460; 1 Greenl. Evid. § 449.

Purchases to supply deficiency arising from the failure of the contractors to perform their contract were required to be made in open market, in order to ascertain the excess of cost, if any, beyond the contract price; and the bill of exceptions shows that the evidence to prove that the purchases made by the United States were so made was undisputed and uncontradicted. Still, the defendants asked the witness called to prove those facts whether he did not commute with some of the subordinate officers for a portion of the forage to which they were entitled, instead of delivering the same to such subordinate officers, to which no direct answer was given; but when the witness was asked if he could state what quantity of such supplies were charged on his books as delivered, which was adjusted by commuting the same with the subordinate officers, he answered that he could by looking at his books. Prior to that, the witness had stated that the prices charged were regular market prices in gold coin, which is in strict conformity to the terms of the agreement; but the defendants requested the witness to examine his books, and to state what the amount was which had been commuted; to which interrogatory the plaintiffs objected, and the court excluded the question.

Interrogatories calling for immaterial testimony may be excluded in the discretion of the court, as shown by the authorities to which reference has previously been made. Doubt upon that subject cannot be entertained, and it is equally certain that it is error to exclude a question, proper in form, which calls for evidence material to the issue. Difficulty frequently arises in determining whether a particular question falls within the one or the other of these categories; and in solving that

doubt, it often becomes necessary, especially in an appellate court, to ascertain what the state of the case was when the question was propounded, and what the effect of the evidence would have been if it had been admitted.

No attempt is made to impeach the fairness of the requisitions made by the quartermaster, or to show that they were greater than the public service required; nor is it contended that the prices paid to supply the deficiencies were higher than the regular market prices in gold coin. What the defendants suggest is, that the agent employed to provide and deliver the deficiency paid some of the subordinate officers in money, instead of delivering the required amount of forage and grain, as he should have done. Both the agent and the subordinate officers in question agreed to the commutation; nor is it suggested that the quartermaster approved the commutation, or that he had any knowledge of the irregular transaction of the agent. Proper charges were made by the agent, and the same were duly paid by the proper disbursing officer.

Viewed in the light of these suggestions, it is clear that no injury resulted to the contractors. They did not suffer by the irregularity, nor is it perceived that it is a matter with which they have any concern, and it certainly furnishes no grounds for reversing the judgment. *Judgment affirmed.*

ONE HUNDRED AND NINETY-NINE BARRELS OF WHISKEY v. UNITED STATES.

1. The forty-fifth section of the act of July 18, 1866 (14 Stat. 163), imposes upon a claimant of distilled spirits, seized for a violation of that section, the burden of proving that the requirements of law have been complied with; and this court, upon consideration of the evidence disclosed in the record, deems it insufficient, and affirms the decree of condemnation.
2. The rule in *The Diana*, 3 Wheat. 58, allowing interest upon the appraised value of the property from the date of the decree of condemnation in the District Court, approved, and applied to this case.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas.

This was a libel against one hundred and ninety-nine barrels of

distilled spirits seized at Galveston, Texas, March 18, 1867, as forfeited to the United States. The causes of forfeiture alleged are, —

1. That the spirits, being subject to the payment of internal revenue tax, were removed otherwise than into a bonded warehouse, without the payment of the tax.

2. That no lawful or genuine inspector's brand was ever put upon them, and they were removed for sale in fraud of the law, and with intent to evade the payment of the taxes thereon chargeable by law, and were fraudulently and illegally marked and branded.

3. That said barrels of distilled spirits, when found and seized by the collector of internal revenue, had never been inspected, gauged, proved, or marked, as required by law, and were fraudulently and illegally marked and branded.

To this libel a claim and answer were filed by Charles Andre, a resident of Matamoras, Mexico, in which he alleged that all the requirements of the laws of the United States relating to the spirits had been complied with previous to the seizure; that they had been duly proved and marked, gauged, and inspected, and the barrels properly branded by the lawful officers of the United States duly appointed for that purpose; and that all taxes required by law had been paid thereon. He also stated that he purchased the spirits in open market at Matamoras, Mexico, in the regular course of business, between the 1st and 12th of February, 1867; that the same having been delivered to him in Mexico, he applied to the United States collector of duties for the district of Brazos de Santiago for permission to import them in the packages as purchased, which permission was granted; that he accordingly transported them from Matamoras to Brownsville, entered them at the custom-house of that district, and by bond secured the duties thereon according to law, and that he secured from the proper officers of the custom-house the usual certificate given in such cases, and sent the spirits forward to Indianola and Galveston for a market.

The evidence produced by the claimant shows that he entered the spirits at the custom-house upon his importation as of the growth, production, and manufacture of the United States, exported on board of certain vessels named, from New York and New Orleans, upon which no drawback, bounty or allowance

had been allowed, and reimported from Matamoras, Mexico, free; that he executed a bond to the United States for the sum of $73,000, with approved sureties, "conditioned that proper certificates to show that the articles were manufactured in the United States, and all taxes paid thereon, would be produced within six months thereafter, or that he would pay the customary custom-house duties required upon such articles of foreign manufacture;" that thereupon the proper landing certificate was issued, and the spirits were transferred from the ferry-boat in which they had been imported to the schooner "Island Belle," for transportation to Indianola and Galveston.

The evidence offered in support of the libel shows that Andre purchased the spirits at Matamoras, at the price of fifty-five cents per gallon; that they were shipped from New Orleans to Matamoras, June 20, 1866, on the British schooner "Village Belle," and, after being duly entered at the custom-house at Matamoras, were landed at that port. The district attorney of the United States then offered in evidence sworn examined copies of the original entry of the spirits by Andre at the Brownsville custom-house, together with sworn and examined copies of the bond given by Andre, and also of the certificates of the collectors of the ports of New York and New Orleans, upon which the bond was cancelled, and proved that the originals of the entry, bond, and certificates were on file at the custom-house in Brownsville, more than a hundred miles distant from Galveston. To the introduction of such copies Andre objected; but the objection was overruled, and they were admitted. The certificates showed shipments from New York to Matamoras, with no record of drawbacks, as follows: —

Oct. 1, 1864,	B. G. H.,	20 barrels.
Feb. 2, 1865,	S. Y.,	75 "
Feb. 10, 1865,	M. P.,	50 "
Jan. 14, 1865,	<S>	50 "
March 11, 1865,	S. <A>	100 "

And from New Orleans to Matamoras, —

Feb. 4, 1865,	<P>	5 barrels.

These shipments all corresponded with the specifications in the entry, except that marked S. <A>. In the entry this

appeared to have been an exportation in the schooner "Brazos," but the certificate showed that it was in the bark "Mary Schofield." To explain this discrepancy, Andre made affidavit that in his entry he gave the name of the schooner inadvertently, the fact being that the exportation was in the bark. It is further proved, that, when the spirits were seized in Galveston, the barrels were carefully examined; that many of them appeared to be old molasses barrels; that many had on them the inspection marks of revenue inspectors at New Orleans and at Cincinnati; that the inspection marks, if ever there were any on some of the barrels, had been covered with dirt, and so obscured as to become illegible, but that most of the barrels contained the inspection marks, "manufactured prior to 1st September, 1866." Subsequently, when the barrels were taken out of the warehouse and delivered to the claimant, by order of the court, he affixed a new brand on the head of each barrel, to do which he had to wash the heads; and all but fifteen or twenty barrels were found to have been branded "tax paid."

Pending the suit, the property was appraised and delivered to the claimant, in accordance with the practice in such cases, upon the execution of a bond with sureties, conditioned to abide and answer the decree of the court in the premises.

Upon this testimony the District Court gave a decree of forfeiture July 21, 1868, and adjudged that the claimant pay into the registry of the court the appraised value of the spirits with interest from that date, and, in default, that execution issue against him and his sureties. From that decree an appeal was taken to the Circuit Court, where a similar decree having been entered May 27, 1874, the claimant appealed here.

Mr. J. M. Burroughs for the appellant.

Mr. Assistant Attorney-General Smith for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

The first ground of forfeiture in this case is based upon sect. 45 of the act of July 13, 1866, 14 Stat. 163, which provides, that, upon seizures made for the causes there stated, the burden of proof is on the claimant to show that the require-

ments of the law have been complied with. It is contended, however, that the passage of the spirits through the custom-house, even though it be duty free, establishes a *prima facie* case in favor of the claimant, and throws the burden of proof upon the United States. Without stopping to inquire whether this is so or not, it is sufficient to say that as between these parties the *prima facie* case made in this way has been completely overcome, and the burden again fairly cast upon the claimant.

The *prima facie* case depends upon sustaining the statement made by Andre in his entry, that the identical spirits seized were exported from New York and New Orleans to Matamoras in the vessels named, without drawback for taxes paid. If this is disproved, the *prima facie* case as made has been met, and the burden placed where it was before.

The certificates of exportation furnished by Andre to the collector in support of the entry do not identify the spirits exported with those seized, any further than by showing that the marks on the barrels exported correspond with those on the barrels seized. The shipments were all made late in 1864 and early in 1865, and from New York, except five barrels from New Orleans. Against this it appears that nearly or quite all the barrels when seized had upon them the inspection marks, "manufactured prior to 1st September, 1866," though the law requiring such marks was not passed until July 13, 1866; that many of the barrels appeared to be old molasses barrels; that many had upon them the inspection marks of revenue inspectors at New Orleans and at Cincinnati; that one witness has sworn that the spirits were actually exported from New Orleans to Matamoras on the British schooner "Village Belle," June 20, 1866; and that Andre purchased them at the price of fifty-five cents per gallon.

With this evidence before us, it is impossible to believe that the spirits mentioned in the several certificates of exportation are the same as those that were seized. True, the inspection mark as to the date of the manufacture is as much inconsistent with an exportation from New Orleans June 20, as with the exportation as claimed; but it shows that, if the statements of Andre are true, the inspection marks have been tampered

with, and that he may properly be called upon for explanations which he has not given.

The evidence, therefore, as we think, clearly justified a decree of forfeiture upon the first ground alleged in the libel. It is true that the inspection marks, if spurious, may have been placed on the barrels while they were in Mexico, and that, so long as the spirits remained in Mexico, they could not be seized for any violation of law previous to their removal; but it is equally true, that, although there could perhaps be no forfeiture for spurious brands affixed in Mexico, such brands may furnish evidence to be considered in determining whether the goods were subject to seizure for what had transpired in respect to them previous to their removal, and, that when brought again into the United States duty free, they were subject to seizure for any cause that existed before their exportation.

In this view of the case, it is unnecessary to consider the objections raised to a recovery upon any of the other charges in the libel.

The sworn and examined copies of the papers on file in the custom-house were admissible in evidence. So far as the bond and entry are concerned, further proof as to them by the United States was unnecessary, because they had been already sufficiently established by the testimony in behalf of the complainant. The cancellation certificates were admissible as declarations by the complainant in connection with the entry and the *prima facie* case he insists he had made, and they were required by law to be taken and filed because they were the identical papers Andre was to produce and deliver to the collector in performance of the conditions of his bond. 1 Stat. 663, sect. 28.

The decree of condemnation was rendered in the District Court July 21, 1868, and under the rule in *The Diana*, 3 Wheat. 58, the interest upon the appraised value was properly calculated and adjudged from that date.

Decree affirmed.

NOTE. — In *One Hundred Barrels of Whiskey* v. *United States*, which was argued at the same time and by the same counsel as was the preceding case, MR. CHIEF JUSTICE WAITE, in delivering the opinion of the court, remarked: —

This case differs from the preceding one only in the fact that the barrels were

seized at Indianola instead of Galveston, and in that the marshal, instead of delivering to the claimant the whole one hundred barrels upon the order of delivery, handed over only fifty-five, and paid him the proceeds of the sale of the remaining forty-five barrels. As these proceeds amounted to more than the appraised value of the property, for which alone the decree below was rendered, we cannot see how the claimant can now object, because he did not receive the spirits.

For the reasons given in the other case, the decree in this is *Affirmed*

CONSOLIDATED FRUIT-JAR COMPANY *v.* WRIGHT.

Letters-patent No. 102,913, issued to John L. Mason, May 10, 1870, for an "improvement in fruit-jars," are void: *first*, because there was a purchase, sale, and prior use of the invention more than two years prior to the application for a patent; *second*, because at the time of such application the invention had been abandoned to the public.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This is a bill in equity filed by the Consolidated Fruit-Jar Company to restrain the alleged infringement by the defendant of letters-patent No. 102,913, issued May 10, 1870, to John L. Mason, for an "improvement in fruit-jars," and of which the complainant, by mesne assignments, is the owner. The court below, upon hearing, dismissed the bill; whereupon the complainant appealed here.

The facts are set forth in the opinion of the court.

Mr. John H. B. Latrobe for the appellant.

Mr. George Gifford, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a case in equity brought by the appellants to enjoin the appellee from infringing a patent issued by the United States to John L. Mason, on the 10th of May, 1870, "for an improvement in fruit-jars," of which patent the complainant is the assignee.

The disclaimer and claim of the patent are as follows:—

"Separately considered, I do not claim a metallic flexible screw-ring or cap, C, for holding a cover on a preserve-jar, nor an external gasket receiving-shoulder upon preserve-jar, except when such

gasket-shoulder is at the top of a continuous glass screw; neither do I claim the combination of a screw-ring cap with a packing-ring, so applied to a jar that a portion or the whole of such packing-ring is exposed within the jar, nor when the gasket-shoulder is at the base of the glass screw, as in my patent of 1858; but —

"What I do claim as new, and desire to secure by letters-patent, is —

"The combination, first, of the shoulder, *b*, to receive a gasket outside and a little below the top of the jar; second, of the cover, B, with the rim, *d*, extending down outside of the top, to press upon the gasket, C; and, third, of the screw-ring or screw-cap, C, with its screw-threads operating upon those of the jar below the gasket-shoulder, — all substantially as above set forth and described."

The screw-cap, C, is described in the patent as made of metal.

The answer sets up several defences. Our remarks will be confined to two of them.

1. That there had been "purchase, sale, and prior use" of the invention "more than two years prior" to the application for the patent.

2. That the invention was abandoned to the public.

These objections are founded upon the seventh section of the act of 1839. Curtis on Pat. (4th ed.) 696.

The invention was completed in June, 1859. The application for the patent was made on the 15th of January, 1868. The intervening period was between eight and nine years. The two years prior to the application began on the 15th of January, 1866. It is within the limits of the tract of time first mentioned that the facts are to be sought upon which the second point is to be determined, and within the same period, less two years after the 15th of January, 1866, that those relating to the first point must have occurred, in order to avail the defendant.

There is no conflict in the testimony.

In June, 1859, Mason had a model made for his jar and cover, according to his invention. He took the model to Reed & Co., glass-makers, in Jersey City. They made for him at least two dozen of the jars. When they were done, Mason received five or six of them, and a short time afterwards, the

residue. Of the first lot, he gave one to Reed, and one to Fitzgerald, his lawyer. The others he took home. What became of them does not appear. Those of the second and larger lot he certainly sold. His recollection to this effect is distinct. He thinks he received for them three or four dollars a dozen. He does not know what was done with them. The inference is a fair one, that they were used for the purpose for which they were intended. His object in selling was twofold, — to get the money which they yielded, and to test their salability in the market.

The statutory clause upon which the second objection is founded is in the disjunctive. The language is "purchase, sale, or prior use" . . . "for more than two years prior" to the application for the patent. The phrase, "for more," as thus used, is loose and inaccurate, and is to be understood as if the language were earlier than "two years prior," &c., or as if "for" were omitted from the sentence. This omission would produce the same effect.

The defects specified are also in the singular. It follows that a single instance of sale or of use by the patentee may, under the circumstances, be fatal to the patent; and such is the construction of the clause as given by authoritative adjudications.

In *Pitts* v. *Hall*, 2 Blatchf. 235, Mr. Justice Nelson said, "The patentee may forfeit his right to the invention if he constructs it and vends it to others to use, or if he uses it publicly himself in the ordinary way of a public use of a machine at any time prior to two years before he makes his application for a patent. That is, he is not allowed to derive any benefit from the sale or the use of his machine, without forfeiting his right, except within two years prior to the time he makes his application." See also *American Hide & Leather Co.* v. *American Tool Co.*, 4 Fisher, 291; *McMillan et al.* v. *Barclay et al.*, 5 id. 189; *McClurg* v. *Kingsland*, 1 How. 202; *Agawam Company* v. *Jordan*, 7 Wall. 583. The result must always depend upon the purpose and incidents accompanying the act or acts relied upon.

If the case stopped here, the facts we have adverted to would be fatal to the patent, upon the ground of the first

objection. But there are further facts developed in the testimony which bear upon this as well as the other point.

The model remained in the possession of Reed, one of the glass manufacturers, unnoticed and uncalled for by Mason until 1867. Not knowing where to find Mason, Reed then sold it at auction. The jar Mason had given him was sold at the same time and in the same way. This utter neglect of the model for so long a time is full of significance, and has an important bearing upon the question of abandonment.

No sufficient reason is disclosed in the record why the application for the patent was not made earlier. It was not for want of the necessary pecuniary means on the part of Mason. There is no proof of such want of means; and the contrary is shown by the fact of his getting a patent for a garbage-box in the year 1867, or about that time. Mason's impression is, that when he took the jar to Fitzgerald, in 1859, the latter said that if patented he could not use the invention, because it would infringe earlier patents which he had parted with to others. He was asked when he next saw Fitzgerald. His answer was, "I think it was a number of years, probably eight or nine years. It was about the time he drew a specification for me for a garbage-box, which I received a patent for." When pressed to state why he did not apply for the patent earlier, he answered, "Well, I don't know as I had any reason or cause for not doing so." It appears that, when the specification for the garbage-box was prepared, Fitzgerald advised that a patent should be taken out for the fruit-jar. Subsequently, when Mason had concluded to make the application, he went in quest of Fitzgerald, to get him to prepare the requisite papers, and found he was dead. He thereupon engaged the services of other counsel, and the application was made.

In the mean time, large interests had grown up in the way of the manufacture and sale of jars substantially the same with Mason's, and of others more or less like it. He was stimulated to make his application by seeing such jars in the market. He had seen them before Fitzgerald advised him finally to get a patent. Even then he failed to give any directions upon the subject. He reached his conclusion subsequently. Large amounts of money must then have been invested in the busi-

ness of making and selling such jars by various persons. It is sufficient to mention the case of Rowley, who is defending this suit in the name of Wright, the appellee.

Rowley, in 1864, was selling jars known as the *Excelsior*. In the spring of 1866 he was called upon by Imlay, who charged that the *Excelsior* infringed a patent issued to him in 1865, which was for a jar such as the appellee is called to account in this case for selling. He bought from Rowley. Rowley took a license from Imlay, and thereupon commenced making and selling jars made according to Imlay's patent. These jars were nearly identical with those described in the Mason patent. A part of those sold had only glass tops, without the metallic covering, which Mason's patent called for. The residue had such covering. Prior to the beginning of the year 1868 he had sold of the jars with glass tops from two hundred and fifty to four hundred gross, making the minimum thirty-six thousand. Before the same period, he had sold a large number of those with the metallic top, and otherwise the same in construction. Thus, before Mason applied for his patent, and as early as 1866, the public was in possession of the invention in question from sources entirely independent of Mason.

It is enough to say, without recapitulating the facts, that in our judgment the defence of abandonment to the public is also clearly made out.

He who is silent when he should speak must be silent when he would speak, if he cannot do so without a violation of law and injustice to others.

The supineness of the patentee is unexplained and inexcusable. A principle akin to the doctrine of equitable estoppel applies.

Inventors are a meritorious class. They are public benefactors. They add to the wealth and comfort of the community, and promote the progress of civilization. A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions. There is a like larger domain held in ownership by the public. Neither an individual nor the public can trench upon or appropriate what belongs to the other. The inventor must comply with the conditions prescribed by law.

If he fails to do this he acquires no title, and his invention or discovery, no matter what it may be, is lost to him, and is henceforward no more his than if he had never been in any wise connected with it. It is made, thereupon, as it were by accretion, irrevocably a part of the domain which belongs to the community at large. The invention here in question is within this category. *Decree affirmed.*

SMITH v. UNITED STATES.

This court will refuse to hear a criminal case, unless the convicted party suing out the writ of error is where he can be made to respond to any judgment which may be rendered here.

ERROR to the Supreme Court of Washington Territory.

Mr. John J. McGilvra for the plaintiff in error.
Mr. Solicitor-General Phillips, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

This cause was docketed here Dec. 29, 1870. In due time a brief was filed on behalf of the plaintiff in error, and the cause has been regularly continued at every term since, no one appearing here in person to represent the plaintiff. At this term we dismissed the writ, on motion of the United States, for want of prosecution, but have since reinstated it on motion of the counsel for the plaintiff in error, who now moves to have it set down for argument. This motion we deny, and order

that, unless the plaintiff in error submit himself to the jurisdiction of the court below on or before the first day of our next term, the cause be left off the docket after that time. *The People* v. *Genet*, 59 N. Y. 80; *Leftwich's Case*, 20 Gratt. 723; *Commonwealth* v. *Andrews*, 97 Mass. 544; see also 31 Me. 592.

Motion to set down the case for argument denied.

OMAHA v. HAMMOND.

Where a contract, entered into by a city for the construction of certain public works, provides that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action, in finally accepting them, is an announcement of his decision that the terms of the contract have been complied with, and is binding upon the city.

ERROR to the Circuit Court of the United States for the District of Nebraska.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. S. A. Strickland* for the plaintiff in error, and by *Mr. E. Wakely* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant in error, plaintiff below, sued the city of Omaha on a contract for the construction of two public wells in the streets of that city. The contract was in writing, and by its terms plaintiff was "to sink and construct two wells, . . . said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall nine inches in thickness, and arched over in a secure and proper manner, the whole to be completed under the supervision and to the satisfaction of the chief engineer of the fire department of said city."

For this work the city was to pay plaintiff "one hundred dollars for each and every one thousand gallons of water which each of said wells shall be capable of producing, and shall produce, within twenty-four hours; the capacity of said wells to be tested by the chief engineer of the fire department of the city of Omaha aforesaid. And upon the report of said officer being made to the council of said city, showing that the wells

are completed and satisfactory, and also showing the amount of water that said well or wells will produce in twenty-four hours, the said party of the first part shall be entitled to and shall receive from the said party of the second part the said sum, to be paid in city warrants."

These extracts from the agreement are all that are necessary to the decision of the case.

The plaintiff proved the construction of the wells under the supervision of the engineer to his entire satisfaction, and his final acceptance of them. But it was also proved that, while the main part of the wells was sunk to the depth of twenty to twenty-three feet of the diameter of twelve feet, the brick curbing of nine inches in thickness, built inside the shaft so sunk, reduced this diameter to ten and a half feet, and that smaller shafts of four or five feet in diameter were sunk below the bottom of the main well to the depth of several feet. These two circumstances constitute the defence of the city.

As to both of them, we think the city is concluded by the action of its own officer, the engineer, who was also, by the terms of the contract, authorized by the parties to it to decide these questions.

It may be conceded that there is room for doubt, whether the wells were to be twelve feet in diameter after they were completed by the building of the curbing, or were to be twelve feet in diameter when the shaft was first sunk, and the nine inch curbing built inside was not to be taken into the account in ascertaining the diameter. The language, we think, rather favors the latter construction. But, if there is an ambiguity, it must be resolved in favor of plaintiff, because the officer of the city, under whose supervision the wells were built, must have adopted this construction, and authorized the plaintiff to build on that view of the contract, as the wells were necessarily built under his immediate supervision and control, and could only have been so built with his approval. Both parties, then, may be said to have adopted and acted on this construction, and are bound by it.

The same principle applies with added force to the smaller shafts sunk deeper than the main ones. There is absolutely nothing in the contract on this subject. The depth of the well,

the propriety of auxiliary shafts, or any other matter tending to increase the flow of water, were left absolutely to the engineer. The whole work was to be done under his supervision and to his satisfaction. It is proved that the depth of the main shaft was determined by him in reference to the length of the hose to be inserted in it. And the auxiliary shaft was also sunk under his direction and with his approval. The city cannot now complain that it was done as he directed.

The instructions of the court were in accord with these views, and they are not erroneous because the judge added to this action of the engineer, as binding the city, the further fact of their acceptance and use of the wells. Whether the fact had any significance or not, they were cetainly bound by the action of the engineer.

It was also of no consequence that the court refused to instruct the jury "that if the plaintiff did not construct said wells according to the terms of his contract, he cannot recover, even though the wells have been used by the authorities of the city," because, as to the only matters in dispute, the engineer had by the contract been constituted the arbiter, and had decided in the plaintiff's favor. *Judgment affirmed.*

WEST WISCONSIN RAILWAY COMPANY v. FOLEY.

1. Under the twenty-third rule, in relation to damages, where a writ of error was sued out merely for delay, more than ten per cent upon the amount of the judgment cannot be awarded, but the court may give less.
2. Being satisfied that this case is one to which that rule should be applied, the court, affirming the judgment below for $26,333, with costs, awards, in addition to interest, $500 damages.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

Argued by *Mr. William F. Vilas*, for the defendant in error.

No counsel appeared for the plaintiff in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is clear that there is no error in this record. The answer

does not state facts sufficient to constitute a defence to the action. No counsel have appeared to prosecute the suit, no brief has been filed, and no error assigned. We are entirely satisfied that the case has been brought here for delay, and that it is proper to adjudge "just damages for delay," under the provisions of sect. 1010, Rev. Stat. The only difficulty we have had has been in respect to the amount.

The original Judiciary Act of 1789 contained a similar provision to that embraced in sect. 1010. 1 Stat. 85, § 23. Under that, rules were adopted by this court at the February Term, 1803, by which it was provided that, in cases where it appeared that the writ had been sued out "merely for delay, damages shall be awarded at the rate of ten per cent per annum on the amount of the judgment," and in cases where there existed a real controversy, "the damages shall be only at the rate of six per cent per annum. In both cases the interest to be computed as part of the damages." Rules 17, 18; 1 Cranch, xviii. At the February Term, 1807, it was ordered that the damages given by these rules should be calculated to the day of the affirmance of the judgment in this court. 4 Cranch, Appendix.

In 1842, Congress enacted "that on all judgments in civil cases . . . recovered in the Circuit and District Courts of the United States, interest shall be allowed, . . . to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of" "the State in which such Circuit or District Court shall be held." 5 Stat. 518, § 8. Notwithstanding this statute, the rule adopted previously remained in force without amendment until the case of *Mitchell* v. *Harmony*, 13 How. 115, decided at the December Term, 1851. Then it became necessary for this court to ascertain the amount due upon the judgment of the Circuit Court in that case after its affirmance; and the direct question was presented, whether only damages at the rate of six per cent should be added to the amount of the judgment, in accordance with the rule, or interest at seven per cent per annum, that being the rate allowed by law on judgments recovered in the courts of the State. After consideration, damages only were allowed according to the rule; but during the

term the rule was amended, to take effect Dec. 1, 1852, so as to make it conform to the statute. 13 id. v. At the next term, December, 1852, a similar question was presented in *Perkins* v. *Fourniquet*, 14 id. 328. There a judgment of the Circuit Court of Mississippi had been affirmed at the December Term, 1851, and damages adjudged at the rate of six per cent per annum, as given by the rule, while the laws of Mississippi allowed interest on judgments in the State courts at eight per cent per annum. When the execution went out from the court below, it required the collection of the judgment with interest at the rate of eight per cent per annum, and damages at the rate of six per cent in addition. This action of the Circuit Court having been brought here for review, the recovery was limited to the amount of the judgment and the damages given by the rule. The opinion of the court, by Mr. Chief Justice Taney, proceeded upon the ground that the act of 1842 did not apply to judgments in this court, but to those in the Circuit and District Courts alone. The rules had been changed at the previous term, he said, not because of "any supposed repugnancy between them and the act of 1842, but because the court deemed it just to place the judgments in this court upon the same footing with the judgments in the Circuit and District Courts; and that suitors in the courts of the United States should stand on the same ground with suitors in the State courts, in its appellate as well as in its inferior tribunals." p. 331.

At the December Term, 1858, our rules were revised and corrected. No change was made in those relating to this subject, except that in cases where the writ of error was taken for delay only, it was provided that "the damages shall be calculated from the date of the judgment in the court below until the money is paid." 21 id. xiii., rule 23.

Under these rules it is apparent that "just damages for delay" were made to take the place of interest during the delay; and this practice continued until the December Term, 1870, when the present rule, in respect to cases where the writ appeared to have been sued out for delay merely, was adopted. It is as follows: "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall

appear to have been sued out merely for delay, damages at the rate of ten per cent, in addition to interest, shall be awarded upon the amount of the judgment." 11 Wall. x.

This is a radical change, and requires us to consider the question of damages as something distinct from that of interest. Heretofore we have never found it necessary to decide whether, if damages are to be awarded at all, they *must* be to the full amount of ten per cent upon the judgment, or *may* be less. This case is one in which, as we think, that question is fairly presented. The defence, though not in law a good one, certainly shows some circumstances in mitigation of damages in excess of interest as compensation for delay.

Under the old rules, the court was sometimes asked to give damages beyond those prescribed. This was always denied; but, so far as we have been able to discover, it has never been decided that less could not be given, under proper circumstances. "Shall" ought undoubtedly to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right; but it need not be for creating a new one. Neither under the statute nor the rule has a party the legal right to demand a judgment for damages in excess of interest. The amount of the damages, as well as the propriety of giving any at all, is left to the judicial discretion of the court. This being the case, we think the rule may fairly be construed as limiting the amount beyond which we cannot go, but as leaving us at liberty to give less than the full sum in cases where, in our judgment, the circumstances are such as to make it proper to do so. An inflexible rule, requiring us to award a certain specified amount, or none at all, would oftentimes operate to defeat itself. The object is to discourage frivolous appeals, as well as to compensate to some extent for the loss which results from delay. Oftentimes ten per cent upon the amount of a judgment might far exceed the loss actually sustained; and in such cases we might decline to award damages at all, if we could not give less, because of the wrong that would be inflicted if we did give them. Thus one of the benefits anticipated from the rule would be lost.

Under these circumstances we hold that while, with the rule in force, we cannot award as damages for delay more than ten

per cent upon the amount of the judgment, we may, in the exercise of our discretion, give less.

Judgment affirmed, with costs, and five hundred dollars damages for the delay, in addition to interest at the rate allowed by law and the rules of this court.

NOTE. — In another case between the same parties, the same action was had by the court as in the preceding case.

COMMISSIONERS OF DOUGLAS COUNTY v. BOLLES.

1. Where a railroad company has been a corporation *de facto* from the date of its organization, its existence and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it.
2. Under the act of the legislature of Kansas, to authorize counties and cities to issue bonds to railroad companies, approved April 10, 1865, and that of Feb. 25, 1868, the board of commissioners of a county is authorized to determine whether the condition precedent to the lawful issue of such bonds has been complied with.
3. A recital by the board in the bonds, showing that such condition has been complied with, is, when they are in the hands of a *bona fide* holder for value, binding upon the county; and he is bound to look for nothing behind the recital except legislative authority for the issue of them.

ERROR to the Circuit Court of the United States for the District of Kansas.

This was an action by Matthew Bolles and M. Shepard Bolles against the board of county commissioners of the county of Douglas, Kansas, upon sundry coupons attached to certain bonds issued by the county. The facts are stated in the opinion of the court.

The following questions of law arose, upon which the judges of the court below were divided in opinion: —

1. Whether, as respects the bonds dated July 1, 1869, and the coupons in suit originally attached to said bonds, there was authority and power in the board of county commissioners of the county to issue said bonds under the act of Feb. 10, 1865, recited in the bonds and other acts of the legislature of the State of Kansas, including the act of Feb. 25, 1868.

2. Whether the bonds mentioned in the preceding question are void in the hands of a holder for value without actual

notice, because the vote on the question of subscribing stock and issuing bonds was had Sept. 12, 1865, before the organization of the company known as the St. Louis, Lawrence, and Denver Railroad Company was made in 1868, to which company the stock was subscribed in 1868, and the bonds were issued and delivered in 1871.

3. Said bonds having been issued upon the facts as found, was the issue of them illegal and invalid in such a sense as to devolve upon the plaintiffs the burden of showing that they, or those whom they represented, were holders of them for value?

4. Whether, as respects the bonds dated July 1, 1872, and the coupons in suit originally attached to said bonds, there was power and authority in the board of county commissioners of the county to issue the same.

5. Whether, upon the facts found, said bonds and coupons last named are void in the hands of a holder for value without actual notice of the orders for and facts connected with the election therefor, and with the organization of the said rail road company.

6. Said bonds having been issued under the facts as found, was the issue of them illegal and invalid in such a sense as to devolve upon the plaintiffs the burden of showing that they, or those whom they represented, were purchasers or holders of them for value?

7. Whether the facts found constitute or show a defence to the bonds of July 1, 1869, or the said bonds of July 1, 1872, the said bonds or coupons attached thereto in suit being in the hands of the plaintiffs, without affirmative proof that they were holders thereof for value without notice of said facts.

There was a judgment for the plaintiffs below; whereupon the defendants brought the case here.

Submitted on printed arguments by *Mr. William M. Nevison* for the plaintiffs in error, and by *Mr. John S. Abbott, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

Whether the St. Louis, Lawrence, and Denver Railroad Company was lawfully a corporation, capable of contracting with the defendants below, is a question that cannot be raised in this case. The findings of the Circuit Court establish that a

majority of the persons named as corporators in the certificate filed in the office of the secretary of state on the eleventh day of May, 1868, published a notice that books would be opened on a designated day for subscriptions to the stock of the company. The books were accordingly opened, subscriptions to the capital stock were made, a meeting of the stockholders ensued, and directors were chosen, together with a president, vice-president, secretary, treasurer, and an executive committee. This was on the 28th of July, 1868; and from that time corporate meetings have been regularly held, and the company has built and operated a railroad from Lawrence to the Missouri State line, and has exercised the usual functions of a railroad corporation. It has been a corporation *de facto*, at least, if not *de jure*, from the date of its organization. Its corporate existence, therefore, and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it.

It was after the organization of the company that the defendants subscribed, on behalf of Douglas County, for $125,000 of its capital stock, stipulating that the subscription should be paid with the county bonds, payable to bearer in thirty years, and that the stock and bonds should be issued and delivered when the railroad should be completed and in full operation from Lawrence to the eastern boundary of Douglas County. The road was thus completed and put in operation; the county received the $125,000 of stock; and the bonds were sold by the railroad company to the contractor for building the road, and, after its completion, delivered to him by direction of the defendants.

The bonds were executed by the board of county commissioners of the county of Douglas, who by law are constituted the financial agents of the county. They were made payable to bearer, and each contains the following recital: "This bond is executed and issued by virtue of and in accordance with the act of the legislature of the State of Kansas, entitled 'An Act to authorize counties and cities to issue bonds to railroad companies,' approved April 10, 1865, and the other laws of said State, and in pursuance of and in accordance with the vote of a majority of the qualified electors of said county of Douglas, at a special election, regularly called and held on Sept. 12, 1865."

This recital, it will be perceived, asserts legislative authority for the issue of the bonds, found in the statute of April 10, 1865, and other laws of the State. Referring to the act of 1865, it is there enacted that the "board of county commissioners of any county to, into, through, from, or near which, whether in this or any other State, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of the county, not exceeding in amount the sum of $300,000 in any one corporation, and may issue the bonds of said county in such amounts as they may deem best, in payment for said stocks, provided that said bonds shall be issued only in payment of assessments made upon all the stocks of such railroad company, which bonds shall bear interest at a rate not exceeding seven per cent per annum, and shall be payable within thirty years. But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election or at some special election to be called by the board of county commissioners, . . . and, in submitting such question, said board of commissioners shall direct in what manner the ballot shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same." Stats. of Kansas, 1865, p. 41. This statute plainly gives to the board plenary authority to subscribe for stock of a railroad corporation, and to issue county bonds in payment of the subscription, though whether such authority in any case may be exercised or not is made to depend upon the collateral question whether the result of a popular election has indicated an approval of the proposed issue. And the board of commissioners is the tribunal contemplated by the laws to determine whether the contingency of fact has occurred, — a determination necessary to be made preparatory to their issuing the county bonds.

The act of 1865 was followed by the act of Feb. 25, 1868, which was in force when the stock subscription above mentioned was made, and when the bonds of Douglas County were executed and delivered. This later act was even more liberal in its grants of authority than the former was. It referred to elections held before its passage, and to irregular elections, which

might not have been in compliance with the statutes. It enacted, in substance, that whenever there had been an election called by the board, at which a majority of the persons voting had voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the board might subscribe and pay the subscription, by issuing to each company the bonds of the county, whether such orders and elections, or either of them, had been in compliance with the statutes in such cases made and provided, or not, or whether the proposition submitted at the election was for the subscription for stock and issuance of bonds to one or more railroad companies. The purpose of this act was evidently to cure irregularities and invalidities of prior elections, and to enlarge the powers of county boards. Still, under this act, as under the former, the board was to judge whether the precedent condition had been complied with in substance. Gen. Stats. of Kansas, 892.

Such, then, having been the authority of the board of commissioners of Douglas County when the bonds now under consideration were issued, what must be the effect of the recitals they contain? The question has been frequently before us for decision, and it is no longer open for debate. In the late case of *Town of Coloma* v. *Eaves*, 92 U. S. 484, we considered it fully, and reviewed many of our former judgments. We there held that when, by legislative enactment, authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition had been complied with, their recital that it had been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. The recitals we have now before us are that the bonds were executed and issued not only in virtue of, but in accordance with, the acts of the legislature, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county. They are untrue, if the board had not followed

the directions of the law, and if there had not been a popular vote at an election, approving the issue of those bonds. The truth or falsehood of the assertion cannot be inquired after here; for, as we have said, the recitals are practically an annunciation of the judgment of the board, that all the steps required by the law had been taken.

Behind such a recital, as we have seen, a *bona fide* holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by the tribunal selected by the legislature.

Do, then, the plaintiffs below stand in the position of *bona fide* holders for value paid, and without notice of any defect or irregularity in the proceedings anterior to the issue of the bonds? In view of the findings of the Circuit Court, very plainly they do. They are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defence. The residue of those held by them are owned by other persons, who deposited them with the plaintiffs for collection, taking a receipt. There is no evidence when or for what consideration those other persons purchased, and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts, nor any thing that casts upon the holders of the bonds or coupons the burden of showing that they are *bona fide* holders for value. The legal presumption, therefore, is that they are. But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defence. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly, the railroad company paid for the bonds and coupons by giving an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fault in the issue. And still more: the contractor for building the

railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretence that he had notice of any thing that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.

It is, therefore, manifest that the plaintiffs have the rights of *bona fide* purchasers, even if the burden of showing it be regarded as resting on them.

What we have said is sufficient to show that the coupons of the first class of bonds, viz., those dated July 1, 1869, are valid evidences of debt as between the plaintiffs and the defendants, and that the former are entitled to a judgment for the amount of them.

It is unnecessary to remark at length upon the second class of bonds and coupons, those dated July 1, 1872. The considerations we have suggested respecting the first apply in full force to the second, and the defendants have no defence to a suit for their recovery brought by the plaintiffs. The first and fourth questions certified from the Circuit Court are, therefore, answered in the affirmative, and the remaining questions in the negative. This leads to an affirmance of the judgment.

Happily, such a result is in accordance with the plainest justice. The case is not one in which the municipality has incurred a debt, without securing the object sought by it. Popular votes approved the issue of the bonds to further the construction of the railroad, which has been completed, and which the county now enjoys. The bonds have not been misappropriated or squandered. They have been applied to the purpose for which they were made. By direction of the county, they were paid to the contractor who built the road, after his contract was completed, and, as intended, they have gone into the hands of remote purchasers. In addition to this, the county received in exchange for them an equal amount of stock of the railroad company. So far as appears, it holds that stock still. It has acted as the owner, by assenting to a consolidation of the company with another. Common honesty demands that a debt thus incurred should be paid. *Judgment affirmed.*

HURST v. HOLLINGSWORTH.

Where a party sued out a writ of error, and obtained the allowance of an appeal, and duly filed a transcript of the record here, the court will not, on motion, dismiss the cause, but, when it comes on to be heard, will determine whether it is properly here by appeal or by writ of error, and proceed accordingly.

ON motion.

Mr. W. P. Ballinger for Hurst.

Mr. James Lowndes, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Hurst, the plaintiff below, being in doubt whether his case was one to be brought here by appeal or by writ of error, took the precaution of suing out a writ of error, and also of obtaining the allowance of an appeal. At the proper time he filed a transcript of the record, and the cause was docketed by the clerk as upon a writ of error; thereupon the defendant moved to docket and dismiss the appeal. Hurst now appears and asks leave to docket his appeal. The defendant does not object to this, but, treating it as an election for Hurst to proceed here upon the appeal, moves to dismiss the writ of error.

These motions are all denied. There was but one action in the court below, and there is but one record. When the transcript of that record was brought here by Hurst, his cause was docketed. It is not necessary to enter it twice, because, out of abundant caution and to guard against a possible chance of dismissal, he has brought it here in two ways. He has but one cause; and, when we come to examine it, we will determine whether it is properly here by appeal or by writ of error, and will proceed accordingly. *Motions denied.*

DAYTON v. LASH.

An appeal, although allowed out of term, is not avoided by the non-service of a citation; but this court will impose such terms upon the appellant as, under the circumstances, may be legal and proper.

ON motion to dismiss an appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Lorenzo Allis in support of the motion.
Mr. Thomas J. Durant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This record shows that an appeal was allowed, a *supersedeas* bond approved, and a citation signed Feb. 26, 1876; but it does not show a service of the citation, and the affidavits presented upon this motion fail to satisfy us that proper service was ever in fact made. The appeal however, duly obtained; and the record has been filed and the cause docketed here. We have, therefore, the record; but a service of the citation is necessary to bring the parties before us, as the appeal was taken out of term. We cannot proceed to hear and determine the cause until the parties are here, either constructively by service, or in fact by their appearance.

Perhaps the language of Mr. Chief Justice Taney, in *Villabolos* v. *United States*, 6 How. 90, and in *United States* v. *Curry*, id. 112, as well as of Mr. Justice Nelson, in *City of Washington* v. *Dennison*, 6 Wall. 496, if read literally and without reference to the facts then under consideration, may be broad enough to justify a dismissal of this appeal, because the citation was not served before the first day of the term. But in the case of Villabolos, the real question was as to the validity of the citation, and not as to its service, if valid; in Curry's case, the citation was not issued until after the term at which the appeal was returnable; and in *City of Washington* v. *Dennison*, the effort was to obtain a *supersedeas* in a case where the writ was not sealed until eleven days after the rendition of the judgment. None of the cases made it necessary to decide that a citation actually issued upon the allowance of an appeal must be served before

The first day of the term, in order to preserve our jurisdiction; and we think that such an omission does not avoid the appeal, it rather furnishes a case where, under the rule in *Martin Hunter's Lessee*, 1 Wheat. 361, and followed in *Davidson* v. *anier*, 4 Wall. 454, we "may grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper."

As this appeal was returnable to the present term, and some attempt was made to serve the citation, which the appellants may have supposed was actually completed, we order that, unless the appellants cause a new citation, returnable on the first Monday in February next, to be issued and served upon the appellee before that date, the appeal be dismissed.

MUNN v. ILLINOIS.

1. Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property.
2. It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and, in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.
3. Down to the time of the adoption of the fourteenth amendment of the Constitution of the United States, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such deprivation.
4. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use.
5. Rights of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.
6. The limitation by legislative enactment of the rate of charge for services

rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but one gives a new effect to an old one.

7. Where warehouses are situated and their business is carried on exclusive within a State, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in inter-state, as well as in State, commerce; and, until Congress acts in reference to their inter-state relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction.
8. The court does not hold that a case may not arise in which it may be found that a State has, under the form of regulating her own affairs, encroached upon the exclusive domain of Congress in respect to inter-state commerce.
9. The ninth section of the first article of the Constitution of the United States operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.
10. The act of the general assembly of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State," approved April 25, 1871. is not repugnant to the Constitution of the United States.

ERROR to the Supreme Court of the State of Illinois.

The Constitution of Illinois, adopted in 1870, contains the following in reference to the inspection of grain, and the storage thereof in public warehouses: —

"ARTICLE XIII. — WAREHOUSES.

"SECTION 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

"SECT. 2. The owner, lessee, or manager of each and every public warehouse situated in any town or city of not less than one hundred thousand inhabitants, shall make weekly statements under oath before some officer designated by law, and keep the same posted in some conspicuous place in the office of such warehouse; and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots shall not be

mixed with inferior or superior grades, without the consent of the owner or consignor thereof.

"SECT. 3. The owners of property stored in any warehouse, or holder of a receipt for the same, shall always be at liberty to examine such property stored, and all the books and records of the warehouse in regard to such property.

"SECT. 4. All railroad companies, and other common carriers on railroads, shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of destination.

"SECT. 5. All railroad companies receiving and transporting grain, in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee, or the elevator, or public warehouse, can be reached by any track owned, leased, or used, or which can be used, by such railroad company; and all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal-bank, or coal-yard may be reached by the cars on said railroad.

"SECT. 6. It shall be the duty of the general assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the Constitution, which shall be liberally construed, so as to protect producers and shippers. And the enumeration of the remedies herein named shall not be construed to deny to the general assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common-law remedies.

"SECT. 7. The general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce."

The provisions of the act of the general assembly of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State," approved April 25, 1871, so far as the same have any direct bearing upon the questions involved in this case, are as follows: —

"SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that public warehouses, as

defined in art. 13 of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B, and C, respectively.

"SECT. 2. Public warehouses of class A shall embrace all warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators, or granaries, being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration.

"SECT. 3. The proprietor, lessee, or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit Court of the county a license, permitting such proprietor, lessee, or manager to transact business as a public warehouseman under the laws of this State, which license shall be issued by the clerk of said court upon a written application, which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same, or, if the warehouse be owned or managed by a corporation, the names of the president, secretary, and treasurer of such corporation shall be stated; and the license shall give authority to carry on and conduct the business of a public warehouse of class A in accordance with the laws of this State, and shall be revocable by the said court upon a summary proceeding before the court, upon complaint of any person in writing setting forth the particular violation of law, and upon satisfactory proof to be taken in such manner as may be directed by the court.

"SECT. 4. The person receiving a license as herein provided shall file, with the clerk of the court granting the same, a bond to the people of the State of Illinois, with good and sufficient surety, to be approved by said court, in the penal sum of $10,000, conditioned for the faithful performance of his duty as a public warehouseman of class A, and the full and unreserved compliance with all laws of this State in relation thereto.

"SECT. 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein

provided, or who shall continue to transact any such business after such license has been revoked (save only that he may be permitted to deliver property previously stored in such warehouse), shall, on conviction, be fined in a sum not less than $100 for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one to any of the persons whose license has been revoked, within one year from the time the same was revoked."

"SECT. 15. Every warehouseman of public warehouses of class A shall be required, during the first week of January of each year, to publish in one or more of the newspapers (daily, if there be such) published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in the warehouse during the ensuing year, which rates shall not be increased (except as provided for in sect. 16 of this act) during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source; and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one per cent per bushel."

On the twenty-ninth day of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them

to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed.

From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: *first*, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, *second*, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error: —

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. W. C. Goudy, with whom was *Mr. John N. Jewett*, for the plaintiffs in error.

The plaintiffs in error could not safely take a license and give a bond, as required by sects. 3 and 4 of the act, because they would thereby waive the right to question the validity of the act. Cooley on Const. Lim. 181; *Baker* v. *Braman*, 6 Hill, 511; *Ferguson* v. *Landrum*, 1 Bush (Ky.), 548; *Home Ins. Co.* v. *Security Ins. Co.*, 28 Wis. 171.

1. The third, fourth, fifth, and fifteenth sections of the act, under which the plaintiffs in error were convicted and fined, are repugnant to the third clause, § 8, art. 1, of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States. *Ward* v. *Maryland*, 12 Wall. 418; *Case of the State Freight Tax*, 15 id. 232; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 id. 419; *Osborne* v. *Mobile*, 16 Wall. 479; *Woodruff* v. *Parham*, 8 id. 123; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *License Cases*, 5 How. 504; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *City of New York* v. *Miln*, 11 Pet. 102.

2. These sections are also repugnant to the sixth clause of sect. 9, art. 1, of the Constitution, which ordains that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

3. They are also repugnant to that part of the first section of art. 14 of the amendments to the Constitution of the United States which ordains that no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of

the laws: 5 Webster's Works, 487; Coke's Inst. 46–50; *Murray's Lessee* v. *Hoboken Land and Imp. Co.*, 18 How. 272; *Hoke* v. *Henderson*, 4 Dev. (N. C.) 15; *Taylor* v. *Porter*, 4 Hill, 146; *Wynehamer* v. *People*, 13 N. Y. 393; Cooley on Const. Lim. 351 *et seq.*; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Sinnickson* v. *Johnson*, 2 Harr. (N. J.) 129; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; also cases cited in note, 13 Wall. 179; *Green* v. *Biddle*, 8 Wheat. 1; *Bronson* v. *Kinzie*, 1 How. 311; Cooley on Const. Lim. 290; *Walker* v. *Whitehead*, 16 Wall. 314; *Rowley* v. *Hooker*, 21 Ind. 144; *Ogden* v. *Saunders*, 12 Wheat. 259; *Willard* v. *Longstreet*, 2 Doug. (Mich.) 172; *Gantly's Lessee* v. *Ewing*, 3 How. 707; and are not within the limits of the police power of the State: 4 Black. Com. 162; Bentham (Edin. ed.), part ix. 157; Cooley on Const. Lim. 572, 577; *Thorpe* v. *I. & M. Railroad Co.*, 27 Vt. 149; *Com.* v. *Alger*, 7 Cush. 84; 2 Kent, Com. 340; *People* v. *I. & M. Railroad Co.*, 9 Mich. 307; *Lake View* v. *Rosehill Cem Co.*, 6 Chicago Legal News, 120; *Benson* v. *Mayor*, 10 Barb. 245; *Vanderbilt* v. *Adams*, 7 Cow. (N. Y.) 449; Broom's Legal Maxims, 357.

They do not regulate the use of property for the future, but deprive the plaintiffs in error of property in existence, and used by them for years prior to the passage of the law. *Wynehamer* v. *People*, 13 N. Y. 378; *Com.* v. *Alger*, 7 Cush. (Mass.) 84; *Bartemeyer* v. *Iowa*, 18 Wall. 129.

The following authorities are directly in point against the exercise of such power: Cooley on Const. Lim. 393; *Doe ex dem. Gaines* v. *Buford*, 1 Dana (Ky.), 490; *Webb* v. *Baird*, 6 Ind. 17; and the examples of legislation in regard to usury, ferries, mills, hackmen, &c., are not precedents justifying it: 7 Bac. Abr. 188 (ed. 1807); Angell on Highways, §§ 47, 48; *Birset* v. *Hart*, Willes, 508; *Mills* v. *County of St Clair*, 2 Gilm. 197; *Dundy* v. *Chambers*, 23 Ill. 369; 15 Vin. Abr. 398; *Hix* v. *Gardner*, Bulst. 195.

The sections in question are repugnant to the provision of the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws. Cooley on Const. Lim. 391; *Walley's Heirs* v. *Kennedy*, 2 Yerg. (Tenn.) 554.

The provisions of the Constitution of Illinois in regard to warehouses do not affect the questions. *Railroad Company* v. *McClure*, 10 Wall. 511; *Home of the Friendless* v. *Rouse*, 8 id. 430; *The Washington University* v. *Rouse*, id. 439.

Mr. James K. Edsall, Attorney-General of Illinois, *contra*.

1. The statute is not a regulation of commerce within the purview of the Constitution. *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, id. 148; *Osborne* v. *Mobile*, 16 id. 479; *Nathan* v. *Louisiana*, 8 How. 73; *People* v. *Saratoga & Rens. Railroad Co.*, 15 Wend. 135; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Slaughter-House Cases*, 16 Wall. 36; *Gilman* v. *Philadelphia*, 3 id. 713; *City of New York* v. *Miln*, 11 Pet. 102; *Crandall* v. *State of Nevada*, 6 Wall. 35; *Brown* v. *Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 504.

2. If the statute is in any sense a regulation of inter-state commerce, it belongs to that class of powers which may be exercised by the State in the absence of conflicting congressional legislation. *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Gilman* v. *Philadelphia*, *supra*; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Crandall* v. *State of Nevada*, *supra*; *License Cases*, *supra*.

3. The statute is not repugnant to that clause of the Constitution which prohibits giving a "preference to the ports of one State over those of another." That clause imposes a limitation only upon the powers of Congress.

4. The statute does not deprive persons of their property without due process of law. Cooley on Const. Lim. 541; *Slaughter-House Cases*, *supra*; *Sharpless* v. *Mayor of Philadelphia*, 27 Pa. St. 166; *Grant* v. *Courter*, 24 Barb. (N. Y.) 232; *Commonwealth* v. *Tewksbury*, 11 Met. 55; *Commonwealth* v. *Alger*, 7 Cush. (Mass.) 84; *Met. Board of Police* v. *Barrett*, 34 N. Y. 667; *Bartemeyer* v. *Iowa*, 18 Wall. 133.

5. Warehousemen for the storage of grain in the manner the business is conducted at Chicago are engaged in a public employment, as distinguished from ordinary business pursuits. In this regard they occupy a position similar to common carriers, who are held to "exercise a sort of public office," and have public duties to perform. *N. J. Steam Nav. Co.* v. *Merchants'*

Bank, 6 How. 344; *Sanford* v. *Railroad Company*, 24 Penn. St. 381; *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *C. & N. W. Railroad Co.* v. *The People*, 56 Ill. 377.

Like common carriers, they are required by law to receive grain from all persons, and store the same upon equal terms and conditions. Rev. Stat. of Ill. (of 1874), p. 821, § 101; *Ross* v. *Johnson*, 5 Burr. 2827; *Low* v. *Martin*, 18 Ill. 288; *Steinman* v. *Wilkins*, 7 Watts & S. (Pa.) 466, 468.

Although the ownership of the property is private, the use may be public in a strict, legal sense; hence, in adjudicated cases, the terms "public wharves," "public roads," "public houses," and "public warehouses," are of frequent occurrence, although the property may be the subject of private ownership. *Dutton* v. *Strong*, 1 Black, 32; *Ives* v. *Hartley*, 51 Ill. 523; *Olcott* v. *The Supervisors*, 16 Wall. 678.

6. Whenever any person pursues a public calling, and sustains such relations to the public that the people must of necessity deal with him, and are under a moral duress to submit to his terms if he is unrestrained by law, then, in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law. *Commonwealth* v. *Duane*, 98 Mass. 1; *State* v. *Perry*, 5 Jones (N. C.) L. 252; *State* v. *Nixon*, id. 258; Bac. Abr. tit. "Carriers," D.; *Murray's Lessee et al.* v. *Hoboken Land and Imp. Co.*, 18 How. 272; *Kirkham* v. *Shawcross*, 6 T. R. 17; 2 Peake N. P. C. 185; 10 M. & W. 415; *Ogden* v. *Saunders*, 12 Wheat. 259; *Mills* v. *County Commissioners*, 4 Ill. 53; *Trustees of Schools* v. *Tatman*, 13 id. 37.

If grain warehousemen in Chicago "pursue a public employment," or "exercise a sort of public office," and sustain such relations to the public that all the grain consigned to "the greatest grain market in the world" must necessarily pass through their hands, the State of Illinois, in virtue of its unquestionable power to regulate its internal commerce, may enact laws prescribing maximum rates of storage. The storage of grain offered for sale in the markets of a State most clearly pertains to its internal or domestic commerce.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in

nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe* v. *R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and

has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Look-

ing, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says: —

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt* v. *Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Aldnutt* v. *Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537): —

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if

he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539):—

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to [that from *De Portibus Maris* already quoted], which includes the good sense as well as the law of the subject."

And in the same case Le Blanc, J., said (p. 541):—

"Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches

upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge, —

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." *Mobile* v. *Yuille*, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 8 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co.* v. *Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the

great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the

hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legisla-

tive interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreason-

able. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the

charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that

there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE FIELD. I am compelled to dissent from the decision of the court in this case, and from the reasons upon which that decision is founded. The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support.

The defendants had constructed their warehouse and elevator in 1862 with their own means, upon ground leased by them for that purpose, and from that time until the filing of the information against them had transacted the business of receiving and storing grain for hire. The rates of storage charged by them were annually established by arrangement with the owners of different elevators in Chicago, and were published in the month of January. In 1870 the State of Illinois adopted a new constitution, and by it "all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

In April, 1871, the legislature of the State passed an act to regulate these warehouses, thus declared to be public, and the warehousing and inspection of grain, and to give effect to this article of the Constitution. By that act public warehouses, as defined in the Constitution, were divided into three classes, the first of which embraced all warehouses, elevators, or granaries located in cities having not less than one hundred thousand inhabitants, in which grain was stored in bulk, and the grain of different owners was mixed together, or stored in such manner

that the identity of different lots or parcels could not be accurately preserved. To this class the elevator of the defendants belonged. The act prescribed the maximum of charges which the proprietor, lessee, or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the Circuit Court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the State in the penal sum of $10,000 for the faithful performance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all laws of the State in relation thereto. The license was made revocable by the Circuit Court upon a summary proceeding for any violation of such laws. And a penalty was imposed upon every person transacting business as a public warehouseman of the first class, without first procuring a license, or continuing in such business after his license had been revoked, of not less than $100 or more than $500 for each day on which the business was thus carried on. The court was also authorized to refuse for one year to renew the license, or to grant a new one to any person whose license had been revoked. The maximum of charges prescribed by the act for the receipt and storage of grain was different from that which the defendants had previously charged, and which had been agreed to by the owners of the grain. More extended periods of storage were required of them than they formerly gave for the same charges. What they formerly charged for the first twenty days of storage, the act allowed them to charge only for the first thirty days of storage; and what they formerly charged for each succeeding ten days after the first twenty, the act allowed them to charge only for each succeeding fifteen days after the first thirty. The defendants, deeming that they had a right to use their own property in such manner as they desired, not inconsistent with the equal right of others to a like use, and denying the power of the legislature to fix prices for the use of their property, and their services in connection with it, refused to comply with the act by taking out the license and giving the bond required,

but continued to carry on the business and to charge for receiving and storing grain such prices as they had been accustomed to charge, and as had been agreed upon between them and the owners of the grain. For thus transacting their business without procuring a license, as required by the act, they were prosecuted and fined, and the judgment against them was affirmed by the Supreme Court of the State.

The question presented, therefore, is one of the greatest importance, — whether it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it.

The declaration of the Constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control.

The Supreme Court of the State — divided, it is true, by three to two of its members — has held that this legislation was a legitimate exercise of State authority over private business; and the Supreme Court of the United States, two only of its members dissenting, has decided that there is nothing in the Constitution of the United States, or its recent amendments, which impugns its validity. It is, therefore, with diffidence I presume to question the soundness of the decision.

The validity of the legislation was, among other grounds, assailed in the State court as being in conflict with that provision of the State Constitution which declares that no person shall be deprived of life, liberty, or property without due process of law, and with that provision of the Fourteenth Amendment of the Federal Constitution which imposes a similar restriction upon the action of the State. The State court held, in substance, that the constitutional provision was not violated so long as the owner was not deprived of the title and possession of his property; and that it did not deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of the property, referring, in support of the position, to instances of its action in prescribing the interest on money, in establishing and regulating public ferries and public mills, and fixing the compensation in the shape of tolls, and in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread. In this court the legislation was also assailed on the same ground, our jurisdiction arising upon the clause of the Fourteenth Amendment, ordaining that no State shall deprive any person of life, liberty, or property without due process of law. But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property "becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;" and from such clothing the right of the legislature is deduced to control the use of the property, and to determine the compensation which the owner may receive for it. When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be *juris privati* solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as

to imply a grant originally, the property was not affected by any public interest so as to be taken out of the category of property held in private right. But it is not in any such sense that the terms "clothing property with a public interest" are used in this case. From the nature of the business under consideration — the storage of grain — which, in any sense in which the words can be used, is a private business, in which the public are interested only as they are interested in the storage of other products of the soil, or in articles of manufacture, it is clear that the court intended to declare that, whenever one devotes his property to a business which is useful to the public, — "affects the community at large," — the legislature can regulate the compensation which the owner may receive for its use, and for his own services in connection with it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The building used by the defendants was for the storage of grain: in such storage, says the court, the public has an interest; therefore the defendants, by devoting the building to that storage, have granted the public an interest in that use, and must submit to have their compensation regulated by the legislature.

If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, any thing like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the

buildings, and "he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The public is interested in the manufacture of cotton, woollen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.

The doctrine of the State court, that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the doctrine of this court, that, whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest, and ceases to be *juris privati* only, appear to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our State constitutions, and by the Fifth and Fourteenth Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State, or Federal has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State can

deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.

No State "shall deprive any person of life, liberty, or property without due process of law," says the Fourteenth Amendment to the Constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a State, under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the

title and possession; or, if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession. If it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion. The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and, practically, as a complete destruction, if it be less than the cost of retaining its possession. There is, indeed, no protection of any value under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession.

This court has heretofore held in many instances that a constitutional provision intended for the protection of rights of private property should be liberally construed. It has so held in the numerous cases where it has been called upon to give effect to the provision prohibiting the States from legislation impairing the obligation of contracts; the provision being construed to secure from direct attack not only the contract itself, but all the essential incidents which give it value and enable its owner to enforce it. Thus, in *Bronson* v. *Kinzie*, reported in the 1st of Howard, it was held that an act of the legislature of Illinois, giving to a mortgagor twelve months within which to redeem his mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value, was void as applied to mortgages executed prior to its passage. It was contended, in support of the act, that it affected only the remedy of the mortgagee, and did not impair the contract; but the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void, and one which took away all remedy to enforce it, or incumbered the remedy with conditions that rendered it useless or impracticable to pursue it. And, referring to the constitutional provision, the court said, speaking through Mr. Chief Justice Taney, that "it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and

abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory, mere words of form, affording no protection and producing no practical result."

And in *Pumpelly* v. *Green Bay Company*, 13 Wall. 177, the language of the court is equally emphatic. That case arose in Wisconsin, the constitution of which declares, like the constitutions of nearly all the States, that private property shall not be taken for public use without just compensation; and this court held that the flooding of one's land by a dam constructed across a river under a law of the State was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded. The court, speaking through Mr. Justice Miller, said: —

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The views expressed in these citations, applied to this case, would render the constitutional provision invoked by the defendants effectual to protect them in the uses, income, and revenues of their property, as well as in its title and possession. The construction actually given by the State court and by this court makes the provision, in the language of Taney, a protection to "a mere barren and abstract right, without any practical operation upon the business of life," and renders it "illusive and nugatory, mere words of form, affording no protection and producing no practical result."

The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor — *sic utere tuo ut alienum non lædas* — is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far

as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied con-

dition of the grant, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases.

Jurists and writers on public law find authority for the exercise of this police power of the State and the numerous regulations which it prescribes in the doctrine already stated, that every one must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. "The police power of the State," says the Supreme Court of Vermont, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the State. According to the maxim, *sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action *to define the mode and manner in which every one may so use his own as not to injure others.*" *Thorpe* v. *Rutland & Burlington Railroad Co.*, 27 Vt. 149. "We think it a settled principle growing out of the nature of well-ordered civil society," says the Supreme Court of Massachusetts, "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it *shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.*" *Commonwealth* v. *Alger*, 7 Cush. 84. In his Commentaries, after speaking of the protection afforded by the Constitution to private property, Chancellor Kent says: —

"But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.* The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of pop-

ulation, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.* 2 Kent, 340.

The Italics in these citations are mine. The citations show what I have already stated to be the case, that the regulations which the State, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of the owner in connection with it.

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. "That government," says Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." *Wilkeson* v. *Leland*, 2 Pet. 657. The decision of the court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument and by the court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the State over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest on money, which I shall presently notice, there was some special

privilege granted by the State or municipality; and no one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which such privilege should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it. The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them; and hence no assent of theirs can be alleged to justify any interference with their charges for the use of their property.

The quotations from the writings of Sir Matthew Hale, so far from supporting the positions of the court, do not recognize the interference of the government, even to the extent which I have admitted to be legitimate. They state merely that the franchise of a public ferry belongs to the king, and cannot be used by the subject except by license from him, or prescription time out of mind; and that when the subject has a public wharf by license from the king, or from having dedicated his private wharf to the public, as in the case of a street opened by him through his own land, he must allow the use of the wharf for reasonable and moderate charges. Thus, in the first quotation which is taken from his treatise *De Jure Maris*, Hale says that the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage

pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." Of course, one who obtains a license from the king to establish a public ferry, at which "every man for his passage pays a toll," must take it on condition that he charge only reasonable toll, and, indeed, subject to such regulations as the king may prescribe.

In the second quotation, which is taken from his treatise *De Portibus Maris*, Hale says:—

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by the public interest."

The purport of which is, that if one have a public wharf, by license from the government or his own dedication, he must exact only reasonable compensation for its use. By its dedication to public use, a wharf is as much brought under the common-law rule of subjection to reasonable charges as it would be if originally established or licensed by the crown. All property dedicated to public use by an individual owner, as in the case of land for a park or street, falls at once, by force of the dedication, under the law governing property appropriated by the government for similar purposes.

I do not doubt the justice of the encomiums passed upon Sir

Matthew Hale as a learned jurist of his day; but I am unable to perceive the pertinency of his observations upon public ferries and public wharves, found in his treatises on "The Rights of the Sea" and on "The Ports of the Sea," to the questions presented by the warehousing law of Illinois, undertaking to regulate the compensation received by the owners of private property, when that property is used for private purposes.

The principal authority cited in support of the ruling of the court is that of *Alnutt* v. *Inglis*, decided by the King's Bench, and reported in 12 East. But that case, so far from sustaining the ruling, establishes, in my judgment, the doctrine that every one has a right to charge for his property, or for its use, whatever he pleases, unless he enjoys in connection with it some right or privilege from the government not accorded to others; and even then it only decides what is above stated in the quotations from Sir Matthew Hale, that he must submit, so long as he retains the right or privilege, to reasonable rates. In that case, the London Dock Company, under certain acts of Parliament, possessed the exclusive right of receiving imported goods into their warehouses before the duties were paid; and the question was whether the company was bound to receive them for a reasonable reward, or whether it could arbitrarily fix its compensation. In deciding the case, the Chief Justice, Lord Ellenborough, said: —

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

And, coming to the conclusion that the company's warehouses were invested with "the monopoly of a public privilege," he held that by law the company must confine itself to take reasonable rates; and added, that if the crown should thereafter think it advisable to extend the privilege more generally to other persons and places, so that the public would not be restrained from exercising a choice of warehouses for the purpose, the company might be enfranchised from the restriction which

attached to a monopoly; but, so long as its warehouses were the only places which could be resorted to for that purpose, the company was bound to let the trade have the use of them for a reasonable hire and reward. The other judges of the court placed their concurrence in the decision upon the ground that the company possessed a legal monopoly of the business, having the only warehouses where goods imported could be lawfully received without previous payment of the duties. From this case it appears that it is only where some privilege in the bestowal of the government is enjoyed in connection with the property, that it is affected with a public interest in any proper sense of the terms. It is the public privilege conferred with the use of the property which creates the public interest in it.

In the case decided by the Supreme Court of Alabama, where a power granted to the city of Mobile to license bakers, and to regulate the weight and price of bread, was sustained so far as regulating the weight of the bread was concerned, no question was made as to the right to regulate the price. 3 Ala. 137. There is no doubt of the competency of the State to prescribe the weight of a loaf of bread, as it may declare what weight shall constitute a pound or a ton. But I deny the power of any legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of every thing, from a calico gown to a city mansion, may be the subject of legislative direction.

Other instances of a similar character may, no doubt, be cited of attempted legislative interference with the rights of property. The act of Congress of 1820, mentioned by the court, is one of them. There Congress undertook to confer upon the city of Washington power to regulate the rates of wharfage at private wharves, and the fees for sweeping chimneys. Until some authoritative adjudication is had upon these and similar provisions, I must adhere, notwithstanding the legislation, to my opinion, that those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered. The chimney-sweeps may, I think, safely claim all the compensation which

they can obtain by bargain for their work. In the absence of any contract for property or services, the law allows only a reasonable price or compensation; but what is a reasonable price in any case will depend upon a variety of considerations, and is not a matter for legislative determination.

The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed. By the ancient common law it was unlawful to take any money for the use of money: all who did so were called usurers, a term of great reproach, and were exposed to the censure of the church; and if, after the death of a person, it was discovered that he had been a usurer whilst living, his chattels were forfeited to the king, and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, Parliament interfered, and made it lawful to take a limited amount of interest. It was not upon the theory that the legislature could arbitrarily fix the compensation which one could receive for the use of property, which, by the general law, was the subject of hire for compensation, that Parliament acted, but in order to confer a privilege which the common law denied. The reasons which led to this legislation originally have long since ceased to exist; and if the legislation is still persisted in, it is because a long acquiescence in the exercise of a power, especially when it was rightfully assumed in the first instance, is generally received as sufficient evidence of its continued lawfulness. 10 Bac. Abr. 264.*

There were also recognized in England, by the ancient common law, certain privileges as belonging to the lord of the manor, which grew out of the state of the country, the condition of the people, and the relation existing between him and

* The statute of 13 Eliz. c. 8, which allows ten per cent interest, recites "that all usury, being forbidden by the law of God, is sin, and detestable;" and the statute of 21 James the First, reducing the rate to eight per cent, provided that nothing in the law should be "construed to allow the practice of usury in point of religion or conscience," — a clause introduced, it is said, to satisfy the bishops, who would not vote for the bill without it.

his tenants under the feudal system. Among these was the right of the lord to compel all the tenants within his manor to grind their corn at his mill. No one, therefore, could set up a mill except by his license, or by the license of the crown, unless he claimed the right by prescription, which presupposed a grant from the lord or crown, and, of course, with such license went the right to regulate the tolls to be received. Woolrych on the Law of Waters, c. 6, of Mills. Hence originated the doctrine which at one time obtained generally in this country, that there could be no mill to grind corn for the public, without a grant or license from the public authorities. It is still, I believe, asserted in some States. This doctrine being recognized, all the rest followed. The right to control the toll accompanied the right to control the establishment of the mill.

It requires no comment to point out the radical differences between the cases of public mills and interest on money, and that of the warehouses in Chicago. No prerogative or privilege of the crown to establish warehouses was ever asserted at the common law. The business of a warehouseman was, at common law, a private business, and is so in its nature. It has no special privileges connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business. No reason can be assigned to justify legislation interfering with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful.

I am of opinion that the judgment of the Supreme Court of Illinois should be reversed.

MR. JUSTICE STRONG. When the judgment in this case was announced by direction of a majority of the court, it was well known by all my brethren that I did not concur in it. It had been my purpose to prepare a dissenting opinion, but I found no time for the preparation, and I was reluctant to dissent in such a case without stating my reasons. Mr. Justice Field has now stated them as fully as I can, and I concur in what he has said.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. IOWA.

1. Railroad companies are carriers for hire. Engaged in a public employment affecting the public interest, they are, unless protected by their charters, subject to legislative control as to their rates of fare and freight.
2. The Burlington and Missouri River Railroad Company has, within the scope of the authority conferred by its charter, and subject to the limitations thereby imposed, the power of a natural person to make contracts in reference to its business. Like such person, it, or its assignee, the plaintiff in error, is, under the same circumstances, subject at all times to such laws as the general assembly of the State may from time to time enact.
3. A power of government which actually exists is not lost by non-user. The fact, therefore, that the power of regulating the maximum rates of fare and freight was not exercised for more than twenty years after the incorporation of that company is unimportant. Nor does it affect the case, that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the stipulated rent. It could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the State of the same powers of regulation which might have been exercised over the company itself.
4. The act of the general assembly of the State of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this State," approved March 23, 1874, is not in conflict with sect 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" nor is it a regulation of interstate commerce.

APPEAL from the Circuit Court of the United States for the District of Iowa.

This bill was filed by the Chicago, Burlington, and Quincy Railroad Company, a corporation created by the laws of Illinois, for an injunction restraining the Attorney-General of the State of Iowa from prosecuting suits against it or its officers, under the provisions of an act passed by the legislature of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State," approved March 23, 1874.

The complainant is the lessee of the Burlington and Missouri River Railroad in the State of Iowa; the two roads being

connected by a bridge which crosses the Mississippi River at Burlington, thus making a continuous and uninterrupted line of railroad from Chicago, Ill., to Plattsmouth, on the Missouri River, Iowa.

In constructing its road, the Burlington and Missouri River Railroad Company executed sundry mortgages upon its property, &c., which are still outstanding.

On Dec. 31, 1872, that company leased its road and branches, with all their fixtures, appurtenances, and equipments of every kind, and all their franchises and privileges, to the complainant in perpetuity, and delivered possession thereof.

By the lease, the complainant covenanted to take immediate possession of the demised premises, and to keep the railroad and branches equipped, and maintain and operate them in such manner as to furnish reasonable accommodations to the public, and to pay all taxes and assessments that might be lawfully levied, charged, or assessed on the roads and property, or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest; to make to the stockholders of the Burlington and Missouri River Railroad, and branches, the same amount of dividends per share that it should make to its own stockholders, and to grant and secure to them the same benefits and emoluments, of every description, that its own stockholders might receive, have, or become entitled to.

The indebtedness, over and above the expenses of keeping the roads in repair and operation, which the complainant became liable to pay for the leased roads, amounted to $7,353,950; and the stock of said roads, upon which it obligated itself to pay dividends, amounts to the further sum of $6,532,552.76; and for the means of payment it relies upon the earnings of the roads.

The complainant claims, that, under the provisions of the laws of Iowa, which existed and were in force when the Burlington and Missouri River Railroad Company was organized, and when the money with which its road and branches were built and equipped, was borrowed, and the mortgages to secure the payment thereof were executed, the company had the right to fix, determine, and establish the tariff of rates, for the trans-

portation of freight and passengers over its road and branches, and that it has always heretofore exercised that right, without question of its power and authority to do so; that this right, power, and privilege were, by the lease aforesaid, assigned, set over, and transferred to the complainant, and that it has, ever since the lease, exercised the power, without question of its right to do so; that, in the exercise of such power, it has fixed and adjusted the tariff of charges for the transportation of persons and property over the road and branches, with a view to furnishing to the country the greatest facilities of transportation, and at the lowest rates, compatible with the duty of the complainant to keep the roads in good condition and repair, and provided with the necessary depots, freight-houses, machine-shops, engines, cars, &c., to meet the demands of business, and to provide the means of defraying the expenses of operating the roads, paying the interest upon the indebtedness, and earning reasonable dividends for the stockholders; and that the earnings of the roads, under the operation of the tariff so established, have been barely adequate, under careful and economical management, to such purposes; and that these ends cannot be attained if the complainant shall be deprived of its just and lawful right to fix its tariff of charges, and be compelled to conform to the act in question.

It is further charged, that the persons who loaned the money with which the road and branches were built and equipped, and to secure the repayment of which the bonds and mortgages were executed, did so in reliance upon the earnings of the roads to refund and repay the money so loaned, and in the full confidence and belief that the right of the company to fix and control the tariff of charges for transportation would never be denied or interfered with.

The complainant insists that the act referred to impairs the obligation of the contract between the State and the Burlington and Missouri River Railroad Company, that between that company and its stock and bond holders, and that between the Burlington and Missouri River Railroad Company and the complainant; and that it is also a violation of that provision of the Constitution of the United States which gives to Congress the power to regulate commerce among the several States.

It also charges that by the said act, and the pretended classification of railroads under it, it is required to transport passengers and property for less compensation than other railroad companies in the State are allowed to charge and receive for transporting persons and property, for equal distances, although the labor, cost, and expense of transportation over the road of complainant are full as much per mile as the labor, cost, and expense of like transportation over the roads which are allowed greater compensation therefor, and that said act is therefore in conflict with and a violation of the sixth section of art. 1 of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The answer, so far as material to the present purpose, admits most of the allegations of the bill, but denies that the Burlington and Missouri River Railroad Company, either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce.

On hearing, the court rendered a decree denying the injunction, and dismissing the bill; from which decree complainant appealed.

The errors complained of are, —

1. The refusal of the court to grant the injunction.

2. The decree dismissing the bill.

Mr. O. H. Browning and *Mr. F. T. Frelinghuysen* for the appellant.

1. The charter of the Burlington and Missouri River Railroad Company is a contract between the company and Iowa, entitled to the protection of the Constitution of the United States, and its obligation cannot be impaired by any act passed by the general assembly of that State. *Miller* v. *State*, 15 Wall. 478; *Pacific Railroad Co.* v. *Maguire*, 20 id. 36; *Railroad Company* v. *Maryland*, 21 id. 456.

2. Under its charter, and the Constitution and laws of Iowa, which existed at the time of its organization, that company had the right to fix the rates of compensation for the transportation

of persons and property over its road; and this right, a material and valuable part of its contract, the State can neither take away nor impair. Revision of the Laws of Iowa, 1860, p. 969; chap. 43 of the Iowa Code, 1851, sects. 673–678, 680; Pierce on Am. Railroad Law, 461; *Miller* v. *State*, *supra*; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Railroad Company* v. *Maryland*, *supra*; *Boyle* v. *Phila. & Reading Railroad Co.*, 54 Penn. 312; *Penn. Railroad Co.* v. *Sly*, 65 Penn. 207; Cooley on Const. Lim. 279, and cases there referred to; *The People* v. *Marshall*, 6 Ill. 684; *Case of the State Freight Tax*, 15 Wall. 232; Ang. & Am. on Corp., sect. 111; *The People* v. *The Manhattan Co.*, 9 Wend. 393; Ang. on Carriers, sect. 124; *The Citizens' Bank* v. *Nantucket Steamboat Co.*, 2 Story, C. C. 35; *Brown* v. *State of Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 574; Iowa Code, 1851, sects. 729, 734, 736, 738, 750; *O. & M. Railroad Co.* v. *McClelland*, 25 Ill. 141.

3. The right which the company had under its charter, and the laws which existed when it was organized, to receive compensation for services, and fix the rates of such compensation, by making its own contracts therefor, has never been forfeited or surrendered, but is still an existing right. 11 Stat. 9; Revision of Laws of Iowa, 1860, pp. 215, 216, 999, 1000; 2 Pars. on Contr. 494, 499; *Parkhurst* v. *Smith*, Willes, 332; Session Acts of Iowa, 1862, 197; id. 1870, 106, 179; Iowa Code, 1873, 239; Session Laws of Iowa, 1868, 13, 66, 68, 167; *The People* v. *Marshall*, *supra*; Session Acts of Iowa, 1864, 44, sects. 1, 2; Iowa Code, 1851, c. 43; *B. & M. R. Railroad Co.* v. *White*, 5 Iowa, 411; *Mayor, &c.* v. *Second Ave. Railroad Co.*, 32 N. Y. 261; *Mayor, &c.* v. *Third Ave. Railroad Co.*, 33 id. 42.

4. The act of the Iowa legislature, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different railroads of this State," approved March 23, 1874, impairs the obligation of the charter contract; of the contract between the company and its stockholders, and bondholders and mortgagees; and the contract between the complainant company and the Burlington and Missouri River Railroad Company; and is therefore unconstitutional, null, and void. Session Acts of Iowa, 1874, p. 61; *Stewart* v. *Laird*, 1 Cranch, 299; *Martin* v. *Hunter's Lessee*,

1 Wheat. 351; *Cohens* v. *Virginia*, 6 id. 264; *Bank of United States* v. *Halstead*, 10 id. 63; *Ogden* v. *Saunders*, 12 id. 290; *Surgett* v. *Lapice*, 8 How. 68; *Gibbons* v. *Ogden*, 9 Wheat. 1; *City of New York* v. *Miln*, 11 Pet. 157, 158; *Ohio Life and Trust Co.* v. *Debolt*, 16 How. 432; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Thomson* v. *Lee County*, id. 327; *Larned* v. *Burlington*, 4 id. 275; *The City* v. *Lamson*, 9 id. 477; *Olcott* v. *The Supervisors*, 16 id. 678; *Supervisors* v. *United States*, 18 id. 71.

5. The act of the Iowa legislature, now in question, is in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Railroad Company* v. *Maryland*, 21 id. 456; *License Cases*, *supra*; *Brown* v. *State of Maryland*, 12 Wheat. 419; *Railroad Commissioners* v. *P. & O. C. Railroad Co.*, 63 Mo. 276; 1 Black. Com. 138; 2 Kent, Com. 320; *Wynehamer* v. *The People*, 13 N. Y. 398, 433; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

6. The act is in conflict with the provision of the Constitution of the United States which gives to Congress the power to regulate commerce among the several States. Congress has exercised that power by the statute of June 15, 1866. 14 Stat. 66. Under it, the authority of the appellant to transport from State to State, and receive compensation therefor, includes *ex necessatati rei* the right and power to fix such rates of transportation.

7. The act, so far as it prescribes the rates of compensation for the transportation of persons and property, is not a police regulation, and cannot be maintained under the police power of the State. *License Cases*, *supra*; 4 Black. Com. 162; 2 Bouv. Law Dic. 348; *Railroad Company* v. *Fuller*, 17 Wall. 560; *State* v. *Noyes*, 47 Me. 189; Cooley's Const. Lim. 574 *et seq.*; *Benson* v. *The Mayor*, *&c.*, 10 Barb. 345; *P. W. & B. Railroad Co.* v. *Bower*, Am. Law Reg., March, 1874, p. 174; *T. W. & W. Railway Co.* v. *Jacksonville*, 67 Ill. 40.

8. The act is in conflict with and a violation of sect. 6

art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

Mr. M. E. Cutts, Attorney-General of Iowa, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn* v. *Illinois*, *supra*, p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington, and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private

persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more

than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn* v. *Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sect. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of *McAunich* v. *M. & M. Railroad Co.*, 20 Iowa, 343, in speaking of legislation as to classes, said, "These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a

company comes into any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done. *Decree affirmed.*

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

PEIK v. CHICAGO AND NORTH-WESTERN RAILWAY COMPANY.

LAWRENCE v. SAME.

1. The Chicago and North-western Railway Company was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The Constitution of Wisconsin, in force when the charters were granted, provides that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." *Held*, that the legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the State, or taken up outside the State and brought within it, or taken up inside and carried without.
2. Certain Wisconsin railroad corporations were consolidated with others of Illinois on terms which, in effect, required that the consolidated company should, when operating in Wisconsin, be subject to its laws. *Held*, that Wisconsin can legislate for the company in that State precisely as it could have legislated for its own original companies, if no consolidation had taken place.

3. The act of Wisconsin, approved March 11, 1874, entitled "An Act relating to railroads, express and telegraph companies, in the State of Wisconsin," is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress shall act in reference to the relations of this consolidated company to inter-state commerce, the regulation of its fares, &c., so far as they are of domestic concern, is within the power of that State.
4. The decision of the Supreme Court of the State of Wisconsin, that said act of March 11, 1874, was not repealed by that entitled "An Act in relation to railroads," approved March 12, 1874, is binding upon this court.
5. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use.
6. No party to this record can raise the question that the statute of Wisconsin violates the obligation of the consolidated company, under the land grant to the Wisconsin and Superior Railroad Company, to keep the part of its road which formerly belonged to the latter company open as a public highway for the use of the government of the United States, free from toll, &c.

APPEALS from the Circuit Court of the United States for the Western District of Wisconsin.

The appellants in the first case, non-residents of the State of Wisconsin, and owners of first-mortgage bonds of the Chicago and North-western Railway Company, filed their bill to restrain the company from obeying, and Paul, Osborn, and Hoyt, railroad commissioners, and Sloan, Attorney-General of Wisconsin, from enforcing, c. 273, Laws of 1874, of that State, which limits the rate of charges for transporting passengers and freights on all the railroads in the State.

The bill sets out the various acts incorporating the company and the companies with which it is consolidated, and it alleges that the company was authorized to give its bonds and mortgages to secure the payment of borrowed money; that the complainants are owners of bonds issued or guaranteed by the company, and secured by mortgages upon various portions of its railroad, executed pursuant to law; that the tariff of rates charged by the company before the passage of that chapter did not produce sufficient income to pay interest on its debt, the legal rate of interest allowed by the laws of the State to its stockholders, and expenses; that the enforcement of said chapter will cause the destruction of the securities held by the complainants; that the classes of freight established by sect. 3 of said chapter are different from the classes of freight estab-

lished by the laws of Illinois, Iowa, and Minnesota, for the transportation of freight upon the railroads of the company in those States, and that it is practically impossible to carry on the business of transporting freight from Wisconsin to either of those States; that the enforcement of said chapter will impair the obligation of the contract entered into between the company and the complainants; that said chapter is in violation of the thirteenth article of the bill of rights of the Constitution of Wisconsin, which declares that the property of no person shall be taken for public use without just compensation therefor; that the general assembly of Wisconsin had no constitutional power to pass said chapter; that the eighteenth section is a regulation of inter-state commerce; and that the company has never accepted said chapter, but will be obliged to conform to the reduced rates of fare and freight therein specified, or cease operations in Wisconsin, unless said chapter shall be held to be unconstitutional.

The bill in the second case was filed by stockholders of the company, and is substantially the same as that in the first case.

Chapter 273 classifies railroads in the State, fixes the limit of fare for the transportation of any person, classifies freights and the maximum rates therefor, and prescribes certain penalties and forfeitures for receiving any greater rate or compensation for carrying freight or passengers than the act provides. It appoints railroad commissioners, and prescribes their duties and powers. The eighteenth section is in the following words: —

"Nothing contained in this act shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from beyond the boundaries of the State, and to be carried across or through the State; but said railroad companies shall possess the same power and right to charge such rates for carrying such freight as they possessed before the passage of this act."

The defendants in each case demurred to the bill of complaint therein filed. The demurrers were sustained, and the defendants brought the cases here.

Mr. W. M. Evarts, *Mr. C. B. Lawrence*, *Mr. B. C. Cook*, *Mr. John W. Cary*, and *Mr. E. W. Stoughton*, for the appellants.

The act entitled "An Act relating to railroads, express and telegraph companies, in the State of Wisconsin," approved March 11, 1874, regarded independently of the clause of the State Constitution, reserving the right to alter or repeal corporate charters, is a clear violation of that provision of the Federal Constitution which forbids a State to pass any law impairing the obligation of contracts. *Wilmington Railroad Co.* v. *Reid*, 13 Wall. 266; *Pacific Railroad Co.* v. *McGuire*, 20 id. 42; *Humphrey* v. *Pigues*, 16 id. 247; *Attorney-General* v. *The Railroad Companies*, 35 Wis. 425.

That clause must be construed in connection with another provision in the same instrument, forbidding the taking of private property for public use, except on due compensation, and in subordination to the Fourteenth Amendment to the Constitution of the United States, which ordains that "no State shall deprive any person of life, liberty, or property, without due process of law." No compensation has been tendered, and the act violates that amendment. *Wynehamer* v. *The People*, 13 N. Y. 392; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 466; *Green* v. *Biddle*, 8 Wheat. 355.

So long as the company operates the road, it has the right to demand a reasonable compensation for its services. That right is not a special franchise or privilege, but exists by universal law, and cannot be abridged or impaired. *Case of the State Freight Tax*, 15 Wall. 233; *Miller* v. *State*, 15 id. 478; *Holyoke Co.* v. *Lyman*, id. 500; *Von Hoffman* v. *Quincy*, 4 id. 535; *Curran* v. *State of Arkansas*, 15 How. 304; *Beardstown* v. *Louisville Railroad Co.*, 4 Met. (Ky.) 308; *Sage* v. *Dillard*, 15 B. Mon. (Ky.) 353; *Commonwealth* v. *Express Company*, 13 Gray, 253.

The question of what is a reasonable compensation is for judicial determination, and cannot be decided by the legislature. *Commonwealth* v. *Proprietors of Bridge*, 2 Gray, 337; *Attorney-*

NOTE. — These cases were elaborately and at great length argued by the respective counsel. It will be impracticable for the reporter to furnish more than a very condensed synopsis of the argument. No attempt will be made to give the particular points which each of the counsel maintained. The argument on each side is given as a whole.

General v. *The Railroad Companies*, *supra*; *P. W. & B. Railroad Co.* v. *Bower*, Law Reg., March, 1874; *Chicago & Alton Railroad Co.* v. *The People*, 67 Ill. 11; *State* v. *Noyes*, 47 Me. 203; *Stamford* v. *Pawlet*, 1 Cromp. & J. 57. The State, being a party to the contract, cannot prescribe the compensation by a subsequent enactment which shall bind the other party. Were it otherwise, the will of each succeeding legislature, and not the charter, would determine the powers and rights of the company.

Conceding that the charter which gave the franchise be subject to repeal, the State cannot take from the company its roadbed and its rolling-stock, or the income derived from their use, without making just compensation. The Supreme Court of Wisconsin, in *Attorney-General* v. *The Railroad Companies*, *supra*, in granting an injunction to restrain the company from operating its road except upon the terms prescribed, declares that "the material property and rights of corporations should be inviolate." This act, so far from leaving them inviolate, takes the income, and thus as effectually deprives the company of the beneficial use of its property, and the means of performing its engagements with its creditors, as if the road was confiscated. There is no substantial difference between a law which diminishes the income of a company thirty per cent, by reducing its tariff of rates, and one which requires it to pay that per cent to the treasurer of State, and obliges him to distribute it *pro rata* among those who paid fares or freight to the company.

In all the adjudged cases on the subject the rulings have been uniform, that there are some necessary limits to the exercise of the power which the State assumes to amend or repeal charters, and among them is, that the character of the companies shall not be changed, nor the purposes of their creation defeated, nor vested rights of property impaired. *Sage* v. *Dillard*, 15 B. Mon. (Ky.) 353.

"It seems to us," says the Supreme Court of Massachusetts, in *Commonwealth* v. *Essex Co.*, 13 Gray, 253, "that this power must have some limit, although it is difficult to define it. Perhaps the rule is this, that where, under a power in the charter, rights have been acquired and become vested, no amendment

or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

Tried by this principle, thus explicitly announced, and which is substantially sustained by this court in *Holyoke Company* v. *Lyman* and *Miller* v. *State*, *supra*, the act cannot be justified. The vital element in the ownership and management of railway property, the right to classify the various kinds of freight, and to determine and receive the proper compensation, is taken from the corporation and vested in the State.

Independently of the foregoing considerations, applicable to all railway companies in the State, the Chicago and North-western Railway Company occupies a peculiar position, which for two reasons places it beyond the reach of the act: —

1. The sale in 1859 of the Chicago, St. Paul, and Fond du Lac road, which is a part of the Chicago & North-western road, under a deed of trust, and by authority of the legislature, vested the title to the first road in certain purchasers, with a right to operate it. The subsequent grant of corporate fran chises conferred on them no additional right in or to the road, and the alteration or repeal of the charter cannot impair any right which they, by their purchase, acquired and held as natural persons.

2. The legislature of Wisconsin entered into a contract with an Illinois corporation, by which the latter acquired rights in that road which the act impairs, in violation of the tenth section of the first article of the Federal Constitution. *Coe* v. *The Columbus, P. & Ind. Railroad Co.*, 10 Ohio, 336; *Atkinson* v. *M. & C. Railroad Co.*, 15 id. 36; *Curran* v. *State of Arkansas*, 15 How. 534; *Railway Company* v. *Wheaton*, 13 Wall. 284; *Morris Canal & Bank Co.* v. *Townsend*, 24 Barb. 658.

The act violates in principle the congressional land grant of June 3, 1856, to which was annexed the condition that the roads of the companies receiving its benefits should "remain public highways for the use of the government of the United States, free from tolls or other charges upon the transportation of property or troops of the United States," and that the mails should be transported at such prices as Congress might direct.

If Wisconsin can pass such an act, it can fix a rate of compensation which will prevent the operation of the road, and disable the company from performing its duties to the general government. *McCulloch* v. *State of Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of United States*, 9 id. 740.

The act violates the contract entered into between the corporation and its bondholders, which the State had authorized, and thus violates that provision of the Federal Constitution which forbids a State to pass a law impairing the obligation of contracts. *Durfee* v. *Old Colony*, 5 Allen, 247; *Curran* v. *State of Arkansas*, 15 How. 304; *Woodruff* v. *Trapnall*, 10 id. 190; *Baring* v. *Dabney*, 19 Wall. 8; *Von Hoffman* v. *City of Quincy*, 4 id. 458; *Hawthorn* v. *Calef*, 2 id. 10; *Tomlinson* v. *Jessup*, 15 id. 457.

The act is a regulation of inter-state commerce, and for that reason unconstitutional. *Case of the State Freight Tax*, *supra*.

Mr. I. C. Sloan and *Mr. L. S. Dixon*, *contra*.

The power reserved to the general assembly by the Constitution to alter or repeal charters, and the effect of its exercise, are the controlling questions in this controversy, and they are not new, either in the courts of Wisconsin, in those of the several States, or in this court.

As early as June, 1854, before the contracts relied upon by the complainants were entered into, or any road now owned and operated by the defendant company was built, or any indebtedness incurred by it or any of its predecessors, the Supreme Court of Wisconsin held that, by the operation of such reserved power, an act of the legislature was valid, although it restricted the amount which, under a charter previously granted, a plank-road company might have charged and received for tolls. *The Madison, Watertown, & Milwaukee Plank-road Co.* v. *Reynolds*, 3 Wis. 287.

The same principle has also been announced in *Pratt* v. *Brown*, id. 603; *Nazro* v. *Merchants' Insurance Co.*, 14 id. 295; *Kenosha, Rockford, & Rock Island Railroad Co.* v. *March*, 17 id. 16; *Whiting* v. *The Sheboygan & Fond du Lac Railroad Co.*, 25 id. 197; *State* v. *Milwaukee Gas Light Co.*, 29 id. 461; *The West Wisconsin Railroad Co.* v. *The Board of Supervisors*

of Trempealeau County, 35 id. 257; *The Attorney-General* v. *The Railroad Companies*, id. 425.

In the last case the court remarks: —

"The power to repeal can bear but one construction. The power to alter depends on the meaning of the word 'alter.' To alter is to make different, without destroying identity (Crabb); to vary, without entire change (Webster and Imp. Dict.). A corporate charter of one kind cannot be altered to a charter of an entirely different kind. But a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains; so that it is varied without entire change. This is the obvious meaning to lawyer or layman. Arguments *ab inconvenienti* cannot weigh against the manifest meaning of the word used: they may go to impeach the wisdom of the power, but not to impair its import."

In this court a similar construction has been given to the same words, and the scope and effect of the reserved power held to be the same, whether it be contained in a special act creating a corporation, or in a general law applicable to all future acts of incorporation, unless specially excepted, or, as in this instance, in the Constitution, under which no unalterable or irrepealable charter can be granted. *Sherman* v. *Smith*, 1 Black, 587; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson* v. *Jessup*, 15 id. 454; *Miller* v. *State*, id. 478; *Holyoke Company* v. *Lyman*, id. 500; *Olcott* v. *The Supervisors*, 16 id. 678.

Charters are to be construed most favorably to the State, and nothing passes by implication. *The Dubuque & Pacific Railroad Co.* v. *Litchfield*, 23 How. 66; *The Binghamton Bridge*, 3 Wall. 51; *Home of the Friendless* v. *Rouse*, id. 430.

The controversy is therefore reduced to the meaning of "alter." The remark in *Tomlinson* v. *Jessup*, *supra*, that "rights acquired by third parties stand upon a different footing," was obviously not intended to intimate that the legislature, in the exercise of the power conferred by the Constitution, may not, by altering the charter of a company without its consent, operate upon its franchises, whenever the public interests would be thereby subserved, although the effect may be incidentally to diminish its resources for the payment of its debts, or depreciate the value of its stock or its bonds. Such an effect constitutes

no valid ground of complaint: if it did, the exercise of the power would be always defeated. Few corporations are free from debt and all of them have stockholders.

Whatever is given by statute may be taken away by statute. *State* v. *Hœflinger*, 31 Wis. 262; *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 184.

The right to charge tolls for the use of roads, bridges, or ferries is a franchise. It was so conceded by counsel on both sides in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, and directly affirmed by this court in *Perrine* v. *Chesapeake & Delaware Canal Co.*, *supra*, and in *Olcott* v. *The Supervisors*, *supra*.

Like rulings have been had in *Blisset* v. *Hart*, Willes, 512; *Whiting* v. *The Sheboygan & Fond du Lac Railroad Co.*, *supra*; *Beekman* v. *Saratoga & Schenectady Railroad Co.*, 8 Paige, 75; *Olcott* v. *Banfill*, 4 N. H. 545; *State* v. *Boston, Concord, & Montreal Railroad Co.*, 25 Vt. 442; *Erie & North-east Railroad Co.* v. *Casey*, 26 Penn. St. 287; *Boston & Lowell Railroad Corporation* v. *Salem & Lowell Railroad Co.*, 2 Gray (Mass.), 27; *Raritan & Delaware Bay Railway Co.* v. *Delaware & Raritan Canal Co.*, 18 N. J. Eq. 570; *Delaware, Lackawanna, & Western Railway Co.* v. *Erie Railway Co.*, 21 id. 298; *McGregor* v. *Erie Railway Co.*, 35 N. J. L. 97; *Blake* v. *Railroad Company*, 19 Minn. 418.

The exercise of the reserved power in question is sustained by the following cases: —

In New York: *McLaren* v. *Pennington*, 1 Paige, 102; *The Schenectady, &c. Plank-road Co.* v. *Thatcher*, 10 N. Y. 102; *Buffalo & N. Y. City Railroad Co.* v. *Dudley*, 14 id. 336; *In the Matter of Oliver Lee & Co.'s Bank*, 21 id. 9; *In the Matter of the Reciprocity Bank*, 22 id. 9; *The Albany Northern Railroad Co.* v. *Brownell*, 24 id. 345; *The Northern Railroad Co.* v. *Miller*, 10 Barb. 260; *White* v. *Syracuse & Utica Railroad Co.*, 14 id. 559; *Hyatt* v. *McMahon*, 25 id. 457; *In the Matter of the Reciprocity Bank*, 17 How. Pr. 323.

In Massachusetts: *Crease* v. *Babcock*, 23 Pick. 334; *Roxbury* v. *The Boston & Prov. Railroad Corporation*, 6 Cush. 424; *Boston & Lowell Railroad Corporation* v. *Salem & Lowell Railroad Co.*, 2 Gray, 1; *Mass. General Hospital* v. *St. Mut. Life*

Ass. Co., 4 id. 227; *Commonwealth* v. *Essex Company*, 13 id. 239; *Fitchburg Railroad Co.* v. *Grand Junct. Railroad Co.*, 4 Allen, 198; *Commonwealth* v. *Eastern Railroad Co.*, 103 Mass. 254; *Commissioners of Fisheries* v. *Holyoke Company*, 104 id. 446; *Mayor, &c. of Worcester* v. *Norwich & Worcester Railroad Co.*, 109 id. 103; *Parker* v. *Metropolitan Railroad Co.*, id. 506.

In Maine: *Proprietors, &c.* v. *Haskell*, 7 Greenl. 474; *Read* v. *Frankfort Bank*, 23 Me. 318; *Meadow Dam Company* v. *Gray*, 30 id. 547; *Oldtown & Lincoln Railroad Co.* v. *Veazie*, 39 id. 571.

In New Jersey: *Story* v. *The Jersey City, &c. Plank-road Co.*, 16 N. J. Eq. 13; *State* v. *Miller*, 30 N. J. L. 368; *State ex rel., &c.* v. *Miller*, 31 id. 521; *State ex rel., &c.* v. *The Mayor, &c.*, id. 575.

In Indiana: *Wilson* v. *Tesson*, 12 Ind. 285.

In Rhode Island: *Bailey* v. *Trustees, &c.*, 6 R. I. 491; *Gardner* v. *Hope Insurance Co.*, 9 id. 194.

In Minnesota: *Perrin* v. *Oliver*, 1 Minn. 202; *Blake* v. *Railroad Company*, 19 id. 418.

In Iowa: *Miner's Bank* v. *United States*, 1 Green, 563.

In Kentucky: *Sage* v. *Dillard*, 15 B. Mon. 347; *Louisville* v. *President, &c.*, id. 642.

In Pennsylvania: *Erie & North-east Railroad Co.* v. *Casey*, 26 Penn. St. 287.

The creation of corporations is a prerogative of sovereignty, to be exercised or not, as the legislature shall see fit; and at such times, in such manner, and subject to such conditions and reservations as it shall determine, regard being had only to the restrictions which the Constitution imposes upon the law-making power. The latter, therefore, by statute, or the people, by fundamental law, may reserve the absolute control over these artificial persons; and there is no authority lodged elsewhere to interfere with or prevent the exercise of this sovereign right. The government which creates may reserve the power to destroy them, or to prescribe the condition upon which their future or continued existence shall depend.

This principle has been fully and clearly recognized by this court. *Railroad Company* v. *Maryland*, 21 Wall. 471; *McCul-*

lach v. *Maryland*, 4 Wheat. 427; *Providence Bank* v. *Billings*, 4 Pet. 513; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Charles River Bridge* v. *Warren Bridge*, *supra*; *Turnpike Company* v. *State*, 3 Wall. 210.

The bondholders and mortgagees of the company have no greater rights or immunity from legislative control than has the company itself, and the existence of their claims in no way impairs or defeats the power to alter or repeal the corporate franchises.

None of the cases cited by the complainants sustain the doctrine contended for by them. On the other hand, the rule of law is well settled in this court. *Mumma* v. *The Potomac Company*, 8 Pet. 281; *Pennsylvania College Cases*, *supra*; *Curran* v. *The State of Arkansas*, 15 How. 311; *Read* v. *Frankfort Bank*, 23 Me. 318.

The stockholders and creditors invested their money subject to the reserved power, of which by presumption of law they had notice. *The East Anglican Railways Co.* v. *The Eastern Counties Railway Co.*, 11 C. B. 775.

The act limiting the tolls and charges of the railroad company is not an encroachment upon the power of Congress to regulate commerce among the several States. No discrimination is made between citizens of the State and citizens of other States. *Case of the State Freight Tax*, 15 Wall. 277; *Railroad Company* v. *Richmond*, 19 id. 584; *Railroad Company* v. *Maryland*, 21 id. 456.

Nor does it contravene the article of the State Constitution which provides that the property of no person shall be taken for public use without just compensation therefor. *Gilman* v. *City of Sheboygan*, 2 Black, 513.

The position cannot be maintained that the legislature lost or forfeited the use of the reserved power by authorizing a corporation to consolidate with one of the same or a different name, incorporated in another State, with an irrepealable charter. A power granted by the Constitution cannot in this way be released or destroyed. By the consolidation, the corporations acquired an identity of interest, but did not necessarily cease to be distinct entities. *Farnum* v. *Blackstone*,

1 Sumn. 47; *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665.

A corporation can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers. *The O. & M. Railroad Co.* v. *Wheeler*, 1 Black, 286; *McGregor, qui tam*, v. *Erie Railway Co.*, 35 N. J. L. 115. The Illinois Company had no authority to consolidate with a corporation created by and operating in Wisconsin, except such as was conferred by an express legislative enactment, the acceptance of which subjected it to all the conditions, obligations, and liabilities which the Constitution and laws of Wisconsin imposed. The consolidated company sustained in Wisconsin the same relation to that State as did the original corporation.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and North-western Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without. That company was by its charter authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." Charter of the Wisconsin & Superior Railroad Co., sect. 6. Other forms of expression are used in charters granted by Wisconsin to other companies, which by consolidation have become merged in the present corporation; but they are all the same in effect. None go beyond this.

The Constitution of the State in force when each of the several acts of incorporation was passed, provides that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." Art. 11, sect. 1.

It was conceded upon the argument that this reserved power of the Constitution gave the legislature "the same power over the business and property of corporations that it has over indi-

viduals," or, as it is expressed by one of the counsel, "nothing more could have been intended than to leave the stockholders in corporations in such a position that the legislature could place them on the same footing with natural persons before the law, and disable them from permanently evading the burdens on all others engaged in similar vocations, by appealing to the letter of their charter. Their object was not to open the door to oppression, but to secure simple equality between citizens of the State, whether working singly or in corporate associations." And, in another place, the same learned counsel says: "The privilege, then, of charging whatever rates it may deem proper is a franchise, which may be taken away under the reserved power, but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege."

Without stopping to inquire whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without any doubt, have that effect. In *Munn* v. *Illinois*, *supra*, p. 113, and *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, *supra*, p. 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions.

It remains only to consider a few questions raised here which were not involved in the cases that have already been decided.

1. As to the consolidation of the Wisconsin corporations with those of Illinois. For the purpose of promoting this consolidation, the legislature of Wisconsin passed an enabling act, and, in so doing, provided that if such consolidation was perfected, "the consolidated company shall be and remain subject to the laws of the State of Wisconsin and the State of Illinois, respectively, and shall have in all respects the same privileges as though this consolidation had not taken place; provided, that the laws of Illinois shall have no force and effect in the State of Wisconsin." Wisconsin Consolidation Act, March 10, 1855,

sect. 8. The second section of the same act also provided that the consolidated company should "have all the rights, privileges, and franchises conferred on the said companies [those in Illinois as well as those in Wisconsin] by the laws of the States of Illinois and Wisconsin, respectively, the same, and not otherwise, as though the said consolidation had not taken place." In this way, Wisconsin in effect said to the Illinois companies, "You may consolidate your interest with those of the named companies in this State, and form one corporation in the two States; but, in so doing, you must, in Wisconsin, be subject to our laws. In Wisconsin, all corporations are liable to have their charters altered or repealed at the will of the legislature. If you are willing to take this risk, we will care for you, within our jurisdiction, precisely as we do for our own corporations."

Upon these terms the consolidation was finally perfected, and the consolidated company now exists under the two jurisdictions, but subject to the same legislative control as to its business in Wisconsin as private persons. The Illinois companies might have stayed out. But they chose to come in, and must now abide the consequences. Thus Wisconsin is permitted to legislate for the consolidated company in that State precisely the same as it would for its own original companies, if no consolidation had taken place. This is the contract by which the Illinois stockholders must abide. Having availed themselves of what they supposed to be the advantages of the consolidation, they cannot repudiate their corresponding obligations.

There is nothing, therefore, in this objection.

2. The obligations of the consolidated company, under the land grant to the Wisconsin and Superior Railroad Company, to keep that part of its road which formerly belonged to that company open as a public highway for the use of the government of the United States, free from toll or other charges upon the transportation of property or troops of the United States, and to transport the mails at such prices as Congress may by law direct. The United States do not complain. It will be time enough for us to consider this objection when they do.

3. As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or

such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.

4. As to the repeal of this act by that of March 12, 1874. The Supreme Court of Wisconsin has decided that there is no such repeal as is claimed. *The Atty.-Gen.* v. *Railroad Companies*, 35 Wis. 427. This is binding on us.

5. As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn* v. *Illinois*. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.

6. The sale of the Chicago, St. Paul, and Fond du Lac Rail road Company. The charter of the company whose road was sold does not confer any right which has been impaired by this legislation. That company, like other railroad companies in Wisconsin, was subject to regulation as to its fares, &c. It is, therefore, unnecessary to consider what might under other circumstances have been the effect of such a sale.

This disposes of the case. No other questions need be considered. If the question ever arises whether the company can be compelled to continue its business at the prices fixed, it will be time enough for us to pass upon it when it reaches here in due course of proceeding. It is not here now.

Decrees affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

CHICAGO, MILWAUKEE, AND ST. PAUL RAILROAD COMPANY v. ACKLEY.

A railroad company in Wisconsin cannot recover for the transportation of property more than the maximum fixed by the act of that State of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered.

ERROR to the Circuit Court of the County of Milwaukee, State of Wisconsin.

Mr. John W. Cary for the plaintiff in error.
Mr. I. C. Sloan, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question presented by this record is whether a railroad company in Wisconsin can recover for the transportation of property more than the maximum fixed by the act of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered.

What we have already said in *Peik* v. *Chicago & Northwestern Railway Company*, and *Lawrence* v. *Same*, *supra*, p. 164, is applicable to this case. As between the company and a freighter, there is a statutory limitation of the charge for transportation actually performed. If the company should refuse to carry at the prices fixed, and an attempt should be made to forfeit its charter on that account, other questions might arise, which it will be time enough to consider when they are presented. But for goods actually carried, the limit of the recovery is that prescribed by the statute. *Judgment affirmed.*

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

WINONA AND ST. PETER RAILROAD COMPANY v. BLAKE.

1. The Winona and St. Peter Railroad Company, having been incorporated as a common carrier, with all the rights and subject to all the obligations which that term implies, was bound to carry, when called upon for that purpose, and charge only a reasonable compensation therefor.
2. Neither the act of the legislature of Minnesota of Feb. 28, 1866, nor the Constitution of the State, adds to or takes from the grant as contained in the original charter.

ERROR to the Supreme Court of the State of Minnesota.

Mr. B. C. Cook and *Mr. C. B. Lawrence* for the plaintiff in error.

Mr. W. P. Clough, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

By its charter, the Winona and St. Peter Railroad Company was incorporated as a common carrier, with all the rights and subject to all the obligations that name implies. It was, therefore, bound to carry, when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which it was authorized to engage. There is nothing in the charter limiting the power of the State to regulate the rates of charge. The provision in the act of Feb. 28, 1866, that the "company shall be bound to carry freight and passengers upon reasonable terms," and that in the Constitution of Minnesota (art. 10, sect. 4), that "all corporations being common carriers, . . . shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms," add nothing to and take nothing from the grant as contained in the original charter.

This case, therefore, falls directly within our rulings in *Munn* v. *Illinois*; *Chicago, Burlington, & Quincy Railroad Company* v. *Iowa*; *Peik* v. *Chicago & North-western Railway Company*; and *Chicago, Milwaukee, & St. Paul Railroad Company* v. *Ackley*, *supra*.

For the reasons stated in the opinions in those cases, the judgment of the Supreme Court of Minnesota is

Affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

NOTE. — In *Southern Minnesota Railroad Company* v. *Coleman*, error to the Circuit Court of the United States for the District of Minnesota, which was argued by *Mr. H. J. Horn* and *Mr. G. E. Cole* for the plaintiff in error, and by *Mr. E. C. Palmer* for the defendant in error, MR. CHIEF JUSTICE WAITE, in delivering the opinion of the court, remarked: This case, in all its essential facts, is precisely like that of *Winona & St. Peter Railroad Company* v. *Blake, supra*. The judgment of the Circuit Court is, therefore, affirmed upon the authority of that case, and for the reasons stated in the opinions which have just been read.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

STONE *v.* WISCONSIN.

As giving a construction to the State Constitution and statute, this court accepts the decision of the Supreme Court of Wisconsin, that the charter of the Milwaukee and Waukesha Railroad Company, granted by the Territory, is subject to repeal or alteration, inasmuch as it was not accepted, nor was the company organized, until after the admission of the State into the Union, under a constitution which continued that act in force, and provided that all laws for the creation of corporations might be altered or repealed by the legislature at any time after their passage.

ERROR to the Circuit Court of the County of Dane, State of Wisconsin.

Mr. John W. Cary for the plaintiff in error.

Mr. I. C. Sloan, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question presented in this case, not decided in *Chicago, Milwaukee, & St. Paul Railroad Co.* v. *Ackley, supra*, p. 179, is as to the effect upon the rights of these parties of the charter of the Milwaukee and Waukesha Railroad Company, passed by the territorial legislature of Wisconsin, March 11, 1847. This provides (sect. 15) that "on the completion of said railroad, or any portion of the track, not less than ten miles, it shall and may be lawful for the company to demand and receive such sum or sums of money for passage and freight

of persons and property as they shall from time to time think reasonable." It is claimed that this gives the company the charter or contract right to fix its own rates of fare and freight, subject only to a judicial determination as to whether they are reasonable. Without admitting that such would be the effect of this provision, we shall dispose of the case upon another ground.

The first section of the act appoints commissioners to receive subscriptions to the capital stock. The second section provides: —

"That the capital stock of said company shall be $100,000, in shares of $100 each; and as soon as one thousand shares of stock shall be subscribed, and five dollars on each share actually paid in, and a statement shall be deposited with the treasurer of the County of Milwaukee, authenticated by the oath of the secretary and two or more of said commissioners, that such subscriptions and payments have been in good faith made, the subscribers of such stock, with such other persons as shall associate with them for that purpose, their successors and assigns, shall be, and they are hereby, declared and created a body corporate and politic, by the name and style of 'Milwaukee and Waukesha Railroad Company,' with perpetual succession, and by that name shall have all the privileges, franchises, and immunities incident to a corporation."

The commissioners named in the first section met and organized, Nov. 23, 1847. Books of subscription were opened, and one of the commissioners was authorized to procure an amendment of the charter. Upon application made under this authority, an amendment, not at all important to the present inquiry, was passed by the territorial legislature, March 11, 1848. The requisite amount of stock was subscribed on or before April 5, 1849. It does not appear that any was subscribed before; but on that day the necessary certificate under sect. 2 was filed with the treasurer of Milwaukee County.

Wisconsin was admitted into the Union as a State, May 29, 1848, 9 Stat. 233, under a constitution ratified by the people, March 2, 1848, which provided, art. 11, sect. 1, that all laws for the creation of corporations "may be altered or repealed by the legislature at any time after their passage."

Upon this state of facts the Supreme Court of Wisconsin decided, in the case of *The Attorney-General* v. *Railroad Com-*

panies, 35 Wis. 599, "that the charter was accepted and the corporation organized many months after the adoption of the Constitution and the admission of the State into the Union by Congress." Previous to that time it "remained a naked unaccepted proposition." p. 601. For this reason, it was held that "its acceptance after the organization of the State, so far as it is a contract, makes it manifestly a contract with the State." p. 605. The ground on which the decision was placed is that, as the act of incorporation had not been accepted when the territory ceased to exist, there was no contract between the corporation and the territory; but the State Constitution having continued the act in force, it became thereafter a State statute for the incorporation of the company, and, as such, subject to the reserved power of alteration and repeal. This construction of the statute and Constitution is binding upon us as a question of State statutory and constitutional law.

This being so, we are not called upon to consider any of the other points which appear in the case in opposition to the effect claimed for the territorial act by the plaintiff in error.

Judgment affirmed.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE STRONG, dissenting.

I dissent from the judgments of the court in the several railroad cases arising in the States of Illinois, Wisconsin, Iowa, and Minnesota, commonly known as the "Granger Cases," and from the reasons on which the judgments are founded. These cases involved a consideration of the charters of the different companies, and of the extent of the power of the legislature over them, as well in the absence of any reservation of a right to alter or repeal them, as when such reservation was embodied in them, or in the constitutions under which they were granted. On the one hand, it was contended that the legislature of each State possessed the power, irrespective of any reservation, to regulate at its discretion the compensation which the companies chartered by it might charge for the carriage of persons and merchandise, without reference to the expenses of the carriage, or the obligations incurred in the construction of the roads. Unlimited power over every railroad corporation in respect to the

business it should carry on, and the compensation it should receive, was asserted, except where these were specifically designated and permanently fixed in the charter.

On the other hand, it was contended that the charters of the companies constituted contracts between the States creating them and the corporators, within the provision of the Federal Constitution prohibiting legislation impairing the obligation of contracts; and that they could not, therefore, be changed in any material particular, unless the power to make the change was reserved in the charters, or in some constitutional provision of the States; that the right of the companies to operate their respective roads and charge reasonable compensation for transportation of persons and merchandise was the essential franchise granted, and that what was reasonable compensation in any case, depending, as it must, upon a variety of considerations, upon which the parties had a right to be heard, was a judicial question, and not a matter for legislative determination.

It was also contended that the clause in the Constitution of some of the States, reserving a power to their legislatures to alter acts of incorporation, did not authorize an entire change in the character of a corporation, or its destruction; and that a sound interpretation of the clause would prevent such a regulation of fares as would take from a company the power to meet its just obligations, by which the means were obtained to construct and equip its road.

The questions thus presented are of the gravest importance, and their solution must materially affect the value of property invested in railroads to the amount of many hundreds of millions, and will have a great influence in encouraging or repelling future investments in such property. They were ably and elaborately argued by eminent counsel, and nothing was omitted which could have informed or enlightened the court. The opportunity was presented for the court to define the limits of the power of the State over its corporations after they have expended money and incurred obligations upon the faith of the grants to them, and the rights of the corporators, so that, on the one hand, the property interests of the stockholder would be protected from practical confiscation, and, on the other hand, the people would be protected from arbitrary and extortionate

charges. This has not been done; but the doctrine advanced in *Munn* v. *Illinois*, *supra*, p. 113, has been applied to all railroad companies and their business, and they are thus practically placed at the mercy of the legislature of every State.

In that case, the court has declared as its solemn judgment that property "becomes clothed with a public interest when it is used in such a manner as to be of public consequence and affect the community at large," and thus loses enough of its private character to make its use subject to regulation, not only in the manner of the use, but as to the compensation which the owner may receive for it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." There is no business or enterprise involving expenditures to any extent which is not of public consequence, and which does not affect the community at large. There is no industry or employment, no trade or manufacture, and no avocation which does not in a greater or less extent affect the community at large, and in which the public has not an interest in the sense used by the court.

There is no doubt of the power of the legislature to prescribe in the charter of any corporation the compensation it may receive for services rendered, or to reserve the power to regulate such compensation subsequently. The power to prescribe the conditions of use and enjoyment necessarily accompanies the power to grant. But the charter of a corporation being a contract, a sufficient consideration for the privileges and franchises conferred being found in the duties and liabilities assumed by the corporators, the subsequent power of the legislature is restrained by its terms. This has been so often judicially declared, that it has been supposed to be no longer open to discussion. The first question, therefore, for consideration in all cases where legislation affects the constitution of a corporation, or its beneficial operation, is, what is the true construction of its charter, and, consequently, what privileges does it confer

and what restraint does it impose upon legislative interference? The rights and privileges implied in the contract are equally as inviolable as those expressed. This question is not met by the court in its opinion, the several cases being disposed of by the novel doctrine announced in *Munn* v. *Illinois*, that the legislature has a right to regulate the compensation for the use of all property, and for services in connection with it, the use of which affects the "community at large;" and the further doctrine, equally novel, that although the charter of a company confers the power to make reasonable charges, the whole matter is reserved to be regulated by the State, in its discretion.

If it be admitted that the reserved power to alter all laws creating corporations authorizes the legislature to regulate the rates of charges of a railroad company for the transportation of persons and property, it should not, in common honesty, be so used as to destroy or essentially impair the value of mortgages and other obligations executed under express authority of the State. The reserved power has not generally been supposed to authorize the legislature to revoke the contracts of the corporation with third parties, or to impair any vested rights acquired under them. But no considerations of this kind are of any weight under the decision in that case.

So long as that decision remains, it will be a waste of words to discuss the questions argued by counsel in these cases. That decision, in its wide sweep, practically destroys all the guaranties of the Constitution and of the common law invoked by counsel for the protection of the rights of the railroad companies. Of what avail is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the State can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property? To what purpose can the constitutional prohibition upon the State against impairing the obligation of contracts be invoked, if the State can, in the face of a charter authorizing a company to charge reasonable rates, prescribe what rates shall be deemed reasonable for services rendered? That decision will justify the legislature in fixing the price of all articles and the compensation for all services. It sanctions intermeddling with all business and pursuits and property in

the community, leaving the use and enjoyment of property and the compensation for its use to the discretion of the legislature. Having already expressed my objections to that decision in a dissenting opinion, I need not repeat them here.

DUNBAR v. MYERS.

1. In letters-patent of the United States, No. 10,965, bearing date May 23, 1854, issued to John Myers and Robert G. Eunson, granting to them, for the term of fourteen years from that date, the exclusive right and liberty of making, using, and vending to others to be used, an improved machine for sawing thin boards, &c., which letters-patent were subsequently extended for the term of seven years from May 23, 1868, the claim of the improvement described as the employment or use of deflecting plates, — one or two, — placed at the sides of a circular saw, for the purposes set forth in the specification, is void, because it does not describe a patentable invention.
2. This court finds that the respondents below did not infringe the second and fourth claims of the patent.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are fully stated in the opinion of the court.

This case was argued by *Mr. Charles F. Blake* and *Mr. Samuel J. Glassey* for Dunbar, and by *Mr. Frederic H. Betts* for Myers.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Inventions, in order that the inventors may be entitled to patents for the same, must be new and useful; and the better opinion is, that the improvement must be of such a character that it involved invention to make it, as the Patent Act confers no right to obtain a patent except to a person who has invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement in one or the other of those described subject-matters.

Sufficient appears to show that a patent in due form was granted to John Myers and Robert G. Eunson, on the 23d of May, 1854, for an alleged invention, described in the specification as relating to certain new and useful improvements

in machines for sawing lumber into thin stuff for the backs of mirrors and picture-frames, and other purposes for which thin stuff is used. Due application was subsequently made for an extension; and the record shows that the patent was regularly extended for the further term of seven years from the expiration of the first term.

Subsequent to the extension of the patent, one of the patentees, to wit, Robert G. Eunson, sold and assigned all his right, title, and interest in the same, and the extension thereof, to Eugene S. Eunson, one of the complainants, who instituted the present suit in the court below. Pending the suit, the other complainant departed this life; and Margaret Myers, his sole executrix, was duly admitted in his stead to prosecute the suit as co-complainant with the assignee of the other half-interest in the extended patent. Infringement is charged, and that the respondents have made large gains and profits by the unlawful use of the patented invention; and the complainants pray for an account and for an injunction.

Process having been issued and service made, the respondents appeared and filed an answer, in which they set up in substance and effect the following defences: 1. That the invention is of no utility or value. 2. That the patentees are not the original and first inventors of the alleged improvement. 3. That the alleged improvement was well known and had been in public use long prior to the supposed invention by the patentees. 4. That knowledge of such prior public use was possessed by the several persons whose names and places of residence are set forth in the answer. 5. That the patented improvement, years before the application for the patent was executed, was fully described in the respective printed publications mentioned in the answer filed by the respondents.

Minute and accurate description of the patented machine is given in the drawings, and the specification divides the invention into four separate features, as follows: 1. That it consists in the employment or use of deflecting plates, — one or two, — placed at the sides of a circular saw, for the purpose of enlarging or expanding the saw kerf to prevent the sawed stuff from coming in contact with the sides of the saw and binding the edge of the same near the teeth. Deflecting plates of the kind

also allow the saw to be stiffened by a proper plate, so that a thin veneer saw may be employed, which will cause but a small waste of stuff in sawing. 2. That the invention consists in the employment or use of elastic clamps attached to the ordinary adjustable and elastic beds, between which the stuff is fed to the saw. Clamps of the kind have an elasticity independent of the beds, and compensate for the varying thickness of the different pieces of stuff to be sawed, by holding firmly the extreme end of the stuff, and keeping it in proper position to the saw, however much the elastic bed may be expanded by a succeeding piece of stuff of greater thickness. 3. That the invention also consists in the employment or use of knives or cutters secured to the adjustable beds, and so arranged as to cut or smooth off the rough and projecting sides of the stuff at the ends, making it of uniform thickness. 4. That it also consists in the combination of an adjustable bed and circular saw, arranged as shown in the specification.

Such a machine necessarily requires a frame, and the patentees state that the frame of the machine described in the specification may be constructed in any proper manner, and that the circular saw is placed on a shaft which runs transversely across the front of the frame.

They employ a circular saw, made of thin steel-plate, such as is used for sawing veneers, on one side of which is a circular plate secured by rivets or screws, the plate being less in diameter than the saw, which has the effect to stiffen the plate of the saw, and to enable the operator to use a thinner saw than he would otherwise be able to do.

Two deflecting plates are also employed by the patentees, one on each side of the saw; the one on the same side of the saw with the stiffening plate covers the upper part of that plate, the outer end of which projects further from the saw than the inner end, — the deflecting plate on the other side of the saw being of the same description, except that it is rather smaller in diameter, and that it projects from the saw at about an equal distance at both ends. They are arranged one on each side of the saw, and are attached to the frame by means of bolts, rivets, or screws.

Two feed-roller beds are placed vertically in the back part

of the frame parallel with each other, both of which are made adjustable by screw-rods which bear against the sides of the beds, the screw-rods of each bed being operated simultaneously by means of chains passing round small toothed wheels at the ends of the screw-rods.

Two cranks are also employed, one of which is attached to one of the toothed wheels of each bed. Lateral elasticity is given to the beds by means of india-rubber or other springs attached to them in a proper manner.

Four feed-rollers are employed, two of which are placed in each bed, and the specification states that the feed-rollers project some distance beyond the inner edges of the beds. Clamps, two in number, are attached to the inner ends of the beds, and at the back part of each clamp there are two journals, one at the top and one at the bottom, fitted in boxes which work or slide in recesses in the top and bottom pieces of the beds.

Set-screws are also provided, which pass transversely through the top and bottom pieces of each bed, the inner ends of which bear against india-rubber springs placed directly back of the boxes.

There are two of these rubber springs at the top of the clamps, one to each clamp, and it appears that they are placed between the clamps and the set-screws, passing transversely through the top pieces of the beds. Hence it follows that the clamps may be made to vibrate laterally; but it also appears that two stops are provided, which pass through the top pieces of the beds, one through each top piece, for the purpose of limiting and regulating the extent of such lateral vibration.

Knives or cutters are also provided, which are placed vertically, one in each bed; but it is unnecessary to enter into those details, as it is not pretended that the respondents have infringed the third claim of the patent.

Motion is given to the feed-rollers by gearing, which is shown in the drawings at the lower part of the rollers.

Means are also provided for adjusting the beds relatively to the saw, so that the boards or other lumber may be sawed into the desired thickness. Either side of the saw may be made the line side in the operation of sawing by the adjustment of the proper roller-bed, so as to prevent expansion or contraction.

Stuff to be sawed, whatever it may be, is placed between the feed-rollers in the beds, and, motion being communicated to the saw and rollers, the stuff is fed forward towards the saw and is cut by it, the two pieces being prevented from bearing against the sides of the saw by means of the deflecting plates. When the outer end of the material to be sawed has passed the inner feed-roller, the clamps bear against the board and hold it in a proper relative position to the saw, so that if another board to be sawed is placed between the feed-rollers it will advance and press forward the board first placed between the rollers, and if the last board is thicker than the preceding one the only effect is that it acts upon the beds and forces the elastic one farther from the permanent one without affecting the clamps, which, owing to the springs, have an independent elasticity.

Tested by the example given in the specification, as illustrating the mode of operation, it is plain that either side of the saw may be made the line side in the practical working of the machine. In the example put by the patentees, they assume that the roller-bed in line with the deflecting plate, which is on the same side of the saw as the stiffening plate, is permanently fixed at one-quarter of an inch from the side of the saw, and that the opposite bed being elastic, the side of the saw on which the thin strip passes is the line side during the operation of sawing; but the patentees state that the opposite side of the saw may be made the line side by permanently fixing the opposite roller-bed and by allowing the other one to remain elastic, and that by these improvements they are enabled to use a thin veneer saw, and to keep the stuff to be sawed in a proper relation to the saw, even when varying in thickness.

Three of the claims of the patent, it is charged, are infringed by the respondents; to wit, the first, second, and third. They are as follows: 1. The employment or use of the deflecting plates, one or both, placed at the sides of the saw, as shown, for the purpose of preventing the sawed stuff from bearing against the sides of the saw and expanding the saw kerf, and also for the purpose of allowing a thin veneer saw to be stiffened by plates, one or two, as desired. 2. They claim the employment or use of the clamps arranged as shown, or in any equivalent way, so that they may have a lateral elastic movement, independent of

the roller-beds to which the clamps are attached, for the purpose of compensating for the varying thickness of different pieces of stuff, and to keep the same in a proper relative position to the saw. 4. They also claim "the employment of an adjustable bed with clamps, as described, in combination with the saw when the saw has a stiffening plate in line with the adjustable bed, by which the stiffened or rounded side of the saw is made the line side of the same for practical operation."

Prior to the hearing, the complainants filed a petition in the Patent Office, in which they state that the patentees, through inadvertence, accident, and mistake, and without any fraudulent or deceptive intention, claimed more in their specification than that of which they were the original inventors. Pursuant to that petition, they were permitted to enter a disclaimer in two respects: 1. To amend the first claim by striking out the words "one or" before the word "both," so that the claim includes *only* the employment and use of the saw with both of the deflecting plates, when both of the plates are used at one and the same time, in the manner and for the purposes described. 2. They also made a corresponding amendment in the specification, limiting the description of the invention to the employment of the two deflecting plates placed at the sides of the circular saw, disclaiming the use of one plate *only*, for the purposes set forth in the specification.

Proofs were taken; and, both parties having been heard, the court entered a decretal order in favor of the complainants, and referred the cause to a master. Due report was made by the master, to which both parties excepted; but the court overruled the exceptions, and, having confirmed the report, entered a final decree in favor of the complainants for the sum of $9,120.94, being the gains and profits made by the respondents, as ascertained by the master. Both parties appealed to this court.

Eight errors are assigned by the respondents, two of which only will be examined: 1. That the court erred in holding that there was invention in using two deflecting plates when the use of one was well known. 2. That the court erred in holding that the respondents infringed the letters-patent granted to the complainants.

Viewed in the light of the disclaimer, it is clear that the first

claim of the patent is for the employment or use of two deflecting plates, one being placed on each side of the saw, for the purpose of preventing the sawed stuff from bearing against the sides of the saw, and to allow a thin veneer saw to be stiffened by the plate employed or used for that purpose; and it is equally clear that the employment or use of one deflecting plate for the purpose was well known and in public use long before the original patentees in this case applied for a patent.

Conclusive evidence to support that proposition is found in the disclaimer filed by the complainants pending the suit, in addition to the other evidence in the case, which is abundantly sufficient to establish the proposition, even without the disclaimer. Authority to make such a disclaimer is beyond question, if it be made in writing, and is duly attested and recorded in the Patent Office. When so made, attested, and recorded, it becomes a part of the original specification to the extent of the interest of those who make it; but the provision is that it shall not affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it. 16 Stat. 206; Rev. Stat. sect. 4917.

Pending suits may proceed, but the disclaimer, when recorded, becomes a part of the original specification, and must be taken into account in construing the patent, and in ascertaining the rights of the parties to the suit, unless it appears that the effect of the disclaimer is to enlarge the nature of the invention, and prejudice the rights of the respondents. *Perry* v. *Skinner*, 1 Webster, Pat. Cas. 253; *Ralston* v. *Smith*, 9 C. B. N. S. 117; S. C. 11 id. 471; *Smith* v. *Nichols*, 21 Wall. 117.

Where the effect of the disclaimer is to diminish the claims of the patent without prejudicing the rights of the respondent, the suit may proceed, notwithstanding the disclaimer, it being held that the disclaimer, under such circumstances, does not affect the pending suit, except to limit and qualify the claims of the patent, and in respect to the question of unreasonable neglect or delay in filing the same. Unreasonable delay not having been suggested, the only effect of the disclaimer in such a case is to limit the nature of the invention secured by the patent, and to diminish the claims of the patent as set forth in

the specification. *Guyon* v. *Serrell*, 1 Blatchf. 245; *Hall* v. *Wiles*, 2 id. 198.

Matters properly disclaimed cease to be a part of the invention; and it follows that the construction of the patent must be the same as it would be if such matters had never been included in the description of the invention or the claims of the specification. 16 Stat. 206; *Seed* v. *Higgins*, 8 El. & Bl. 767; *Higgins* v. *Seed*, id. 763; *O'Reilly* v. *Morse*, 15 How. 121; *Taylor* v. *Archer*, 8 Blatchf. 317.

Tested by these considerations, it is clear that the first claim of the patent is for the employment or use of two deflecting plates, one placed on each side of the saw, for the purposes therein set forth and described. Circular plates attached to circular saws, secured by rivets or screws, for the purpose of strengthening the central portion of the saw-plate, and sometimes called stiffening plates, are old devices which have been known to the operators of the circular saw ever since the circular saw came into general use for sawing shingles, laths, and clapboards. Nor is any argument necessary to show that the employment of one deflecting plate covering the upper part of the stiffening plate on the same side of the circular saw is old, as that is proved by the evidence, conceded in argument, and alleged in the disclaimer filed by the complainants.

Concede that, and still it is insisted by the complainants that they employ or use two deflecting plates, one placed on each side of the saw, and that the employment or use of the additional deflecting plate on the opposite side of the saw is a new and useful improvement in the operation of the machine, for which the patentees, whom they represent, were justly entitled to the patent set forth in the bill of complaint.

Operators of machines for sawing lumber, whether with circular or vertical saws, have long known that some means were useful, if not absolutely necessary, to spread the two parts of the lumber behind the saw, so as to prevent the lumber as sawed from binding against the two faces of the saw to such an extent as to endanger the saw and impede the progress of the work without an increase of the motive power. Wedges, in early times, were used by the operator to accomplish the object, and various other devices were employed before the

deflecting plate came into use, which, it seems, has had the effect to supersede all other devices previously known to effect the described function. Such machines for sawing lumber, constructed with one deflecting plate, were well known and in general use years before the patentees in this case made their application for a patent; and the evidence satisfies the court that for most purposes the machine will operate as well and as successfully with one deflecting plate as with two. Two deflecting plates may be better than one, where it is desired to split thin stuff into two parts of equal thickness, as in that case the saw kerf may be enlarged by deflecting the stuff on each side of the saw.

Grant that two such plates are in certain cases better than one used alone, still the question arises whether it involves any invention to add the second plate to a machine already constructed with one plate. Beyond doubt, every operator who had used a machine having one deflecting plate knew full well what the function was that the deflecting plate was designed to accomplish, and the reasons for placing it at the side of the saw are obvious to the understanding of every one who ever witnessed the operation of a circular saw. Ordinary mechanics know how to use bolts, rivets, and screws, and it is obvious that any one knowing how to use such devices would know how to arrange a deflecting plate at one side of a circular saw which had such a device properly arranged on the other side, it being conceded that both deflecting plates are constructed and arranged precisely alike, except that one is placed on one side of the saw and the other on the opposite side. Both are attached to the frame in the same manner; nor is it shown, either in the specification or drawings, that there is any thing peculiar in the means employed for arranging the deflecting plates at the sides of the saw, or in attaching the same to the frame. Both are alike, except that the outer end of the one on the same side as the strengthening plate projects farther from the saw than the inner end, and that the other is rather smaller in diameter, and that the ends project about an equal distance from the saw.

Expert witnesses were examined upon the point, whether it required invention to attach a second deflecting plate to such a

machine; and one of the most intelligent and learned of his class testified to the effect that the deflecting plate on one side of the complainant's machine performs precisely the same duty as the plate upon the other side of the saw, and that it required no invention to apply a second plate in such a case to perform exactly the same duty as the one previously applied on the opposite side of the saw, — that such second application is a mere duplication of the first; and he supports his conclusion by apt examples, which are both persuasive and convincing.

Persons seeking redress for the unlawful use of letters-patent must allege and prove that they, or those under whom they claim, are the original and first inventors of the alleged improvement, and that the letters-patent have been infringed by the party against whom the suit is brought. *Prima facie* support to the first requirement is derived from the patent, if it is introduced in evidence and is in due form, provided the alleged improvement is one which in its nature is patentable. Evidence to overcome that presumption, however, is always admissible, if due notice is given by the opposite party, as required by law; and the question is now well settled, that the question whether the alleged improvement is or is not patentable, is, in an equity suit, a question for the court.

Applicants for a patent are required to file in the Patent Office a written description of their invention, and of the manner and process of making, constructing, and using the same, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to make, construct, and use the patented improvement. Rights of the kind are given only to inventors or discoverers of some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and the law is well settled that nothing short of invention or discovery will support a patent for any such alleged new and useful improvement.

Certain other important conditions are also annexed to the exercise of the right to obtain such a muniment of title for such an invention or discovery; as, for example, the improvement must not only be new and useful, but it must be one not known or used by others in this country, and not patented or described before the invention or discovery in any printed pub-

lication in this or any foreign country, and must not have been in public use or on sale for more than two years prior to the application for the patent. 16 Stat. 201; *Collar Company* v. *Van Dusen*, 23 Wall. 563.

Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention. *Hotchkiss* v. *Greenwood*, 11 How. 267.

Ten years later, a case came before this court, in which the plaintiff claimed certain improvements in the construction of a machine for sawing lumber with the circular saw, including the manner of affixing and guiding the saw by allowing end play to its shaft, in combination with the means of guiding the device by friction-rollers and other appliances. Mills for sawing logs with a circular saw had been well known long before the supposed invention; and, in construing the claim of the patent, this court said that the claim is for the precise organization of the old machine, namely, the manner of affixing and guiding the circular saw by allowing end play to its shaft, in combination with the means of guiding it by friction-rollers, so as to leave the centre entirely unchecked; adding, that there is nothing new in the combination, and assigning as the reason for the conclusion, that the improvement had long been known and used in the circular saw for sawing timber of smaller dimensions than ordinary saw-logs.

Enough appears to show that the machine in that case was larger than those of the kind which had preceded it; but the court remarked that that circumstance did not afford any ground in the sense of the patent law for a patent, for the reason that the ordinary mechanic was doing the same thing every day in making a working machine from the patent model.

In order to reach invention, say the court in that case, the patentee must carry his improvement further: he must contrive

the means of adapting the enlarged old organization to the new use, namely, the sawing of saw-logs, and claim, not the old parts, but the new devices by which he has produced the new results. *Phillips* v. *Page*, 24 How. 167.

Decisions by this court of later date have been made to the same effect; as, for example, the court decided that the claim of the patentee for making the cases of door-locks and latches double-faced, or so finished that either side of the case may be used for the outside, in order that the same lock or cased fastening may answer for a right or left hand door, was void, because the patentee did not show that he was the original and first inventor of the improvement, and intimated very strongly that the making of such a case, with two faces just alike, and so finished off in point of style that either side was fit to be presented outwards, was not a matter which could be patented, even if no locks with such cases had ever before been made. *Jones* v. *Morehead*, 1 Wall. 162.

Patented improvements which are not new and useful, or which did not require any invention or discovery to make the same, as compared with what existed or was in use before, may be declared invalid by the court in an equity suit. *Stimpson* v. *Woodman*, 10 id. 121.

Mere change in a machine of one material for another, as wood or wood strengthened with iron for iron alone, is not invention in the sense of the Patent Act, and therefore is not the subject of a patent. *Hicks* v. *Kelsey*, 18 id. 670.

Old processes are sometimes applied to new subjects, and where that was so, in a case which did not require the exercise of the inventive faculty, and without the development of any idea which could be deemed new or original in the sense of the patent law, it was held that the supposed improvement was not the subject of a patent, and that courts of justice may take judicial notice of a thing in the common knowledge and use of the people throughout the country. *Brown* v. *Piper*, 91 U. S. 38.

Proof of the state of the art is admissible in equity cases, without any averment in the answer touching the subject, and in actions at law, without giving the notice required when evidence is offered to invalidate the patent. It consists of

proof of what was old and in general use at the time of the alleged invention; and may be admitted to show what was then old, or to distinguish what is new, or to aid the court in the construction of the patent.

Meritorious inventors are entitled to protection; but it is settled law that a mere carrying forward of an original patented conception, involving only change of form, proportions, or degree, or the substitution of equivalents, doing the same thing as the original invention by substantially the same means, is not such an invention as will sustain a patent, even though the changes of the kind may produce better results. *Smith* v. *Nichols*, 21 Wall. 115.

Effective support to the proposition that nothing but invention or discovery will entitle an applicant to a patent is also found in the reported decisions of the circuit courts, as appears from the following citations. Judge Story held, many years ago, that the mere application of an old process, machine, or device to a new use was not patentable, — that there must be some new process or some new machinery to produce the result, in order that the supposed inventor may properly have a patent for the alleged improvement. *Howe* v. *Abbot*, 2 Story, 194; *Bean* v. *Smallwood*, 2 id. 411; *Glue Co.* v. *Upton*, 6 Off. Gaz. 842; 7 id. 648.

Conclusive support to the proposition that an applicant for a patent is not entitled to the public protection, unless the supposed improvement involves actual invention or discovery, is found in the oft-repeated decisions of all the English courts having jurisdiction in such cases; and it is safe to remark, that the courts of that country apply the rule more readily, and with a much closer scrutiny, than do the courts of this country exercising the like jurisdiction. *Ralston* v. *Smith*, 11 H. L. C. 223; *Harwood* v. *Railway Company*, 11 id. 654; *Jordan* v. *Moore*, Law Rep. 1 C. P. 624; *Kay* v. *Marshall*, 8 Cl. & Fin. 245; *Bush* v. *Fox*, 5 H. L. C. 707; *Tetley* v. *Easton*, 2 C. B. N. S. 706; *Horton* v. *Mabon*, 12 id. 437; *Ormson* v. *Clarke*, 14 id. 475; *Parkes* v. *Stevens*, Law Rep. 8 Eq. 358; S. C. Law Rep. 5 Ch. App. 36; *Envelope Company* v. *Seymer*, 5 C. B. N. S. 164; *White* v. *Toms*, 17 Law Times, N. S. 319; *Ralston* v. *Smith*, 11 C. B. N. S. 471; *Ormson* v. *Clarke*, 18 id. 337; *Ralston* v.

Smith, 9 id. 117; *Saunders* v. *Aston*, 8 Barn. & Ad. 881; *Seed* v. *Higgins*, 8 El. & Bl. 743.

For these reasons, we are all of the opinion that the claim of the improvement described as the employment or use of two deflecting plates, one placed on each side of the circular saw, for the purposes set forth in the specification, is void, because it does not constitute a patentable invention.

Suppose that is so, still it is insisted by the complainants that the decree of the Circuit Court should be affirmed in respect to the second and fourth claims of the patent.

Clamps are employed or used by the complainants, arranged as shown, so as to have a lateral elastic movement, independent of the roller-beds to which the clamps are attached, for the purposes set forth in the second claim. Admit that the claim is a valid one, still it is insisted by the respondents that they do not infringe that part of the patented invention, and, consequently, that the decree of the Circuit Court should be reversed.

Four adjustable feed-rollers are shown in the machine of the respondents, and in front of them there is a pair of clamps, of peculiar construction, the object and only practical effect of which, it seems, is to hold the upper edge of the stuff to be sawed in proper position while it is in contact with the saw. Evidently they differ in form, method of attachment, purpose, and use from those described in the specification of the complainants. Instead of that, the clamps described in the complainants' patent are attached to the inner ends of the roller-beds, so that there are two journals at the back part of each clamp, which fit in boxes, and work or slide in recesses in the top and bottom pieces of the roller-beds.

To that it may be added, that the action of the clamps in the complainants' machine is governed by the set-screws which bear against rubber springs back of the boxes, the distance of the lateral vibration of the clamps being regulated by the stops, which are arranged to pass through the top pieces, the object of the arrangement being to give the clamps the ability to have a lateral elasticity and vibratory movement independent of the roller-beds, for the purpose, as stated in the claim, of compensating for the varying thickness of the different pieces of stuff,

and to keep the stuff to be sawed in a proper relative position to the saw.

Competent experts testify that the clamps in the machine used by the respondents have no lateral elastic or vibratory motion independent of the roller-beds, and that they cannot perform the functions of the clamps described and claimed in the patent set forth in the bill of complaint; and the court is of the opinion, from an examination of the models exhibited, that the testimony of the expert is correct.

Keeping in view what has already been remarked, a few additional observations will be sufficient to dispose of the questions arising under the fourth claim of the specification, in which the complainants claim the employment of an adjustable bed, with clamps as described, in combination with the saw, when the saw has a stiffening plate in line with the adjustable bed, by which the stiffened or rounded side of the saw is made the line side.

Taken as it reads, the fourth claim does not include a deflecting plate, and only a stiffening plate on one side of the saw; and, if not, it is difficult to see how the devices claimed in the combination will permit the stiffened or rounded side of the saw to be made the line side, unless the deflecting plate is added to the claimed combination. Add the deflecting plate to the combination, and it is quite clear that the claim may include parts sufficient to be operative; but when such stiffened side is thus made the line side, and the clamps embrace the saw as described, it is quite essential that the clamp on the line side should have a lateral elasticity with respect to the bed, and also the described swinging motion. Neither the clamp on the line side or the one on the opposite side in the respondents' machine have any lateral elasticity with respect to the roller-bed, or a swinging motion, and the one on the line side of the saw has no lateral motion whatever when the machine is in operation.

Differences of opinion may possibly exist upon that topic, but all must agree that the claimed combination includes the clamps, and that infringement is not proved, unless it appears that the respondents use the entire combination. Having already decided that the respondents do not use the clamps of

the complainants, it is unnecessary to pursue the inquiry, except to say that it is settled law, that, where the respondent in constructing his machine omits one of the ingredients of the complainant's combination, he does not infringe the complainant's patent. *Gould* v. *Rees*, 15 Wall. 194; *Prouty* v. *Ruggles*, 16 Pet. 341; *Vance* v. *Campbell*, 1 Black, 427; *Gill* v. *Wells*, 22 Wall. 28.

Suffice it to remark, that, in view of these conclusions, it becomes unnecessary to examine the errors assigned in respect to the rule of damages.

Decree reversed, and cause remanded with directions to enter a decree dismissing the bill of complaint.

COMMISSIONERS OF JOHNSON COUNTY v. JANUARY.

1. Where, upon the performance of certain conditions precedent, the issue of bonds to a railroad company by the board of commissioners of a county in Kansas is authorized by law, the bonds, when issued, if they recite such performance, are, in the hands of a *bona fide* holder for value, binding upon the county.
2. The acceptance and holding by the county of the certificate of stock of the company, the issue and delivery of the bonds to the company, and the payment of interest on them for a time, cured the defects, if any existed, as to the order for submitting the question of subscription to a popular vote, and authorized a *bona fide* taker of the bonds to presume that every thing necessary to their validity had been properly done.
3. The fact that the act under which the bonds were issued is erroneously referred to in their recitals does not render them void.

ERROR to the Circuit Court of the United States for the District of Kansas.

The case is stated in the opinion of the court.

Mr. Nelson Cobb for the plaintiffs in error.

The bonds in question derive no validity from the act of Feb. 25, 1868, as it was expressly repealed by the fourth section of the act of Feb. 27, 1869, without any saving clause as to pending proceedings. The election, ordered when the former law was in force, not having been held until after the last law took effect, was, with all the subsequent action to which it

gave rise, unauthorized and void. *Aspinwall* v. *Commissioners of Daveiss County*, 22 How. 364; *Covington, &c. Railroad Co.* v. *Kenton*, 12 B. Mon. (Ky.) 144. Their issue was not authorized by the act of 1869, as after its passage no election was ordered, and the county is not estopped from contesting their validity, especially when their recitals show an absence of legal authority for the doings of the board in the premises. *Marsh* v. *Fulton County*, 10 Wall. 676.

The plaintiff below was not therefore a *bona fide* holder of the bonds in question. This court has repeatedly held that paper otherwise negotiable, which on its face shows that which should arouse suspicion and put the taker upon inquiry, cannot be so transferred as to cut off defences which would have been available against the original holder. *Fowler* v. *Brantly*, 14 Pet. 318; *Goodman* v. *Simonds*, 20 How. 343; *Angle* v. *North-western Mutual Life Insurance Co.*, 92 U. S. 330; *Harshman* v. *Bates County*, id. 569.

The subsequent acts of the county do not estop it from setting up the defences upon which it relies in this suit. Bigelow on Estoppel, p. 80; *Clark* v. *Session*, 22 N. Y. 312; *Langdon* v. *Dowd*, 10 Allen, 423; *Freeman* v. *Cooke*, 2 Exch. Rep. 644; *Howard* v. *Hudson*, 2 El. & Bl. 1; *Anderson* v. *Lyon*, 11 Allen, 349; *Wells* v. *Truesdell*, 6 Pick. 455. The only interest paid on the bonds was that paid to the plaintiff below. The delivery of the certificates of stock was necessary to complete the subscription, and was, like it, void. The registration by the State auditor on the application of the holder of the bonds was without notice or knowledge of the county or its officers. Upon neither of these facts, therefore, can the doctrine of estoppel have any application.

Mr. James Grant, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action brought to recover the amount of certain coupons taken from bonds issued by the plaintiffs in error to the St. Louis, Lawrence, and Denver Railroad Company, of which bonds the defendant in error was the holder.

By consent of parties the case was tried by the court without a jury. The court found the facts, and gave judgment for the

defendant in error. The plaintiffs in error thereupon brought the case to this court for review.

There is no dispute between the parties as to the leading facts of the controversy. The proper authorities submitted the question to the electors of the county, whether the county should subscribe for $100,000 of the stock of the company, to be paid for by issuing its bonds to that amount. The election was ordered on the 25th of January, 1869, and took place on the 6th of April, 1869. The proposition was sanctioned by a majority of more than two to one. The bonds were thereafter executed and deposited as escrows. On the 22d of May, 1871, the commissioners made an order that they should be delivered, and they were delivered accordingly. A certificate of stock was issued and delivered by the company, and is still held by the county. It has never been surrendered, nor offered to be surrendered. The bonds were signed by the chairman and clerk of the board of commissioners, and attested by the county treasurer. There was in each one a recital "that this bond is executed and issued by virtue of, and in accordance with, an act of the legislature of Kansas, entitled 'An Act to authorize counties and cities to issue bonds to railroad companies,' approved Feb. 25, 1868, and is in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county of Johnson, at a regular election, held on the sixth day of April, 1869." Each one bore, also, the following indorsement: —

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that the bond has been duly registered in my office, in accordance with an act of the legislature, entitled 'An Act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvements, and providing for the registration of such bonds and the repealing of all laws in conflict therewith,' approved March 2, 1872. Witness my hand and official seal, this twenty-first day of March, 1872."

The certificate is authenticated by the official signature and seal of the auditor.

The road was finished, and has since been in operation. The county and its inhabitants are in the enjoyment of the benefits arising from it.

There is no imputation of any taint of fraud upon either side.

The county authorities paid the interest upon the bonds for a time.

The county has received what it contracted to receive, and has paid what it contracted to pay.

The plaintiff in the suit is the *bona fide* holder of the bonds.

A case of stronger equity can hardly exist.

Several objections have been taken to the validity of the bonds. They have been elaborately and ably argued upon both sides. The view which we take of the controversy renders it necessary to advert to but one of the objections, and to that one briefly. Our judgment will be placed upon a different ground.

The act mentioned in the recital in the bond was erroneously referred to. That act does not affect the case, and may be laid out of view. The act of Feb. 25, 1868, was in force when the order for the election was made. It gave ample authority for making the order, and for all that was subsequently done. It is insisted that this act was repealed by the act of Feb. 27, 1869; that the order for the election fell with the act repealed, and that, consequently, the election was held without any legal authority. Such repeal, so far as regards the authority to make the order, and the continuing efficacy of the order, is strenuously controverted upon the other side.

Whatever may be the fact, we are satisfied that after the passage of the act of 1869 all the proceedings were in substantial conformity to its requirements. It was in force before the election was held and until after the bonds were issued and delivered.

This act, like the act of 1868, authorized the commissioners to issue the bonds when the requirements of the law had been complied with. They were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment

that it was proper to do so. It implies a prior determination to that effect. The fact carries with it this presumption. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute, but *falsa demonstratio non nocet.* The bad here does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a *bona fide* holder, no question involving the infirmity of the securities can be raised.

The principle of estoppel applies, and it precludes the obligor from interposing such a defence.

Whether the certificate of the auditor of State, indorsed on the bonds, has or has not the same effect, is a point not necessary in this case to be considered. Taking and holding the certificate of stock, issuing and delivering the bonds, and paying the interest for a time, cured the defect as to the order for an election, if any such existed. Under the circumstances, a *bona fide* taker had a right to presume that every thing had been properly done which was necessary to the validity of the bonds. When this suit was instituted, the objections which have been made were too late.

The views we have expressed have been repeatedly sustained by the adjudications of this court. *Supervisors* v. *Schenk*, 5 Wall. 772; *Olcott* v. *The Supervisors*, 16 id. 698; *City of Lexington* v. *Butler*, 14 id. 283; *Pendleton County* v. *Amy*, 13 id. 298; *Myers* v. *Muscatine*, 1 id. 385; *Knox* v. *Aspinwall*, 21 How. 544; *Lind* v. *The County*, 16 Wall. 6; *St. Joseph's Township* v. *Rogers*, id. 644; *Pine Grove* v. *Talcot*, 19 Wall. 666.

We refer especially to the closing part of the opinion in the case last mentioned. *Judament affirried.*

ATLANTIC DELAINE COMPANY v. JAMES.

The power of a court of equity to cancel an executed contract ought not to be exercised, unless the fraud and false representations set up as the ground for relief are clearly proved, and the complainant has been thereby deceived and injured.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The facts are stated in the opinion of the court.

Mr. William M. Evarts and *Mr. A. Payne* for the appellant.

Mr. C. H. Hill for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

The bill was originally filed by Charles T. James against the Atlantic Delaine Company, George W. Chapin, and Lyman B. Frieze; and, after the death of the complainant, it was revived by his administratrix. Its object is to obtain a cancellation of a release of James's interest in the capital stock of the company, together with a retransfer of the stock, and an account. The history of the transaction sought to be annulled is as follows, so far as it is necessary now to refer to it: On the second day of September, 1851, James made a general assignment of all his property, for the benefit of his creditors, to Lyman B. Frieze. Among the properties thus assigned was an interest in the capital stock of the company, for which certificates had never been issued, but which, it is alleged, in equity belonged to the complainant. The release sought to be cancelled was made by the assignee. It was dated March 2, 1853, and acknowledged on the 11th of the same month. Concurrently with it, the company executed a release to the assignee and to the complainant of all claims and demands, actions and causes of action whatsoever held by it against the complainant or his assignee, or against the assigned estate. These mutual releases were intended as a settlement of mutual claims. The company was a large creditor of General James. It held his mortgages, and among them one upon his right to the capital stock and property of the corporation; and it had other claims against him, and claims also against his assignee, as such, growing out of the

assignment. On the other hand, General James had claims against the company, which passed by his deed of assignment to his assignee. An arrangement was then made between the assignee and the company, by which the latter accepted, in full settlement of the claims it held against James and his assignee, a conveyance of all the right, title, and interest which James had at the date of his assignment, and which the assignee then held, in and to the capital stock and property of the corporation; and mutual releases were exchanged. It is this transaction, and the assignee's release, which the complainant seeks to have set aside, alleging that the release and conveyance were obtained by fraud.

It is obvious, at first sight, that most of the allegations of the bill have little, if any, relevancy to that subject. At most, they are matters of inducement, introductory to the one important averment upon which alone the bill can rest. That averment is, in substance, that untrue and incorrect statements of the condition and affairs of the company were exhibited to the complainant's assignee, with intent to deceive him; statements by which he was deceived, and induced to consent to the settlement that was made, and to execute the release of the stock. Unless this allegation has been sustained by proof, the complainant's suit must fail. It is admitted in the appellee's brief that the case turns upon it.

We shall spend no time, therefore, in considering the introductory averments. Most of them are unsustained by the evidence; and, were they all true, they would confessedly be of no importance, if the principal averment is not proved.

The case exhibits but a single statement of the condition and affairs of the corporation, made or furnished to either the complainant or to his assignee, and it is that one which is now charged to have been false and fraudulent. The accuracy and good faith of that alone is assailed. The circumstances that preceded its being furnished to Mr. Frieze, the assignee, were the following: On the 5th of February, 1853, George W. Chapin, the treasurer of the company, and the trustee in the mortgages which James had given to secure the payment of $75,000 borrowed by him, and long past due, by virtue of a power contained in the mortgages, advertised for sale the property described in

them, including General James's interest in the capital stock of the Delaine Company. The times appointed for the sales were the twenty-fifth and twenty-sixth days of the same month; but the sale of the stock was advertised for the twenty-sixth. On the 15th of February, Frieze, the assignee of General James, sent the following note to Chapin: —

"PROVIDENCE, Feb. 15, 1853.

"GEORGE W. CHAPIN, trustee for Hill, Carpenter, & Co., and others, and treasurer of the Atlantic Delaine Company:

"DEAR SIR, — I feel it my duty to demand of you a statement of the condition, standing, and accounts of the Atlantic Delaine Company, so that I may be able to represent the delaine stock, &c., which you have advertised, as trustee, to be sold on the 25th and 26th instant, in its true light and value, and make it sell for what it is worth. Very truly yours,

"L. B. FRIEZE,
"*Assignee of Charles T. James.*"

The note upon its face explained for what the statement was wanted. It was that the assignee might know, so far as the account would show, the value of the stock, and that he might guide his action by that knowledge. Before, however, any statement was made out and furnished, in answer to this demand, the sale of the stock was enjoined; but, on the 26th of the month, Chapin made out and sent to Mr. Frieze the following: —

Statement of the Atlantic Delaine Company, Jan. 1, 1853.

Bills payable	$410,615.39
Due agents for advances on goods	90,026.19
Due various persons on account	51,404.44
Capital stock	237,495.53
	$789,541.55

Credit.

Cash and bills receivable, on hand	$13,584.92
Cost of real estate, cassimere department, and amount paid Charles T. James's contract account	310,006.04
Due from Lyman B. Frieze, assignee	53,314.77
Due from sundry persons	2,061.38
Wool, cotton, and supplies at mill	190,692.17
Delaines, cassimeres, on hand	149,516.74
Balance	70,365.53
	$789,541.55

"I would state that our directors estimate that $50,000 or more of the above balance accrued from the non-fulfilment of the contract with Charles T. James, which they shall prosecute against him or his assignee.

"The above is a true copy from the books.

"(Signed) GEORGE W. CHAPIN, *Treasurer.*

"PROVIDENCE, Feb. 26, 1858."

The Circuit Court was of opinion that this statement was false and fraudulent, and that it was furnished with the intent to deceive and defraud, by promoting a settlement prejudicial to General James, and more favorable to the corporation than truth and justice would admit. With this opinion we cannot concur. A careful and thorough examination of all the evidence submitted has failed to convince us that there was any substantial error in the statement, or that it did not truly exhibit the condition, standing, and accounts of the company when it was given. There are not many particulars in which it is now alleged the exhibit was untrue. We shall notice all that are alleged.

1. It is said, on behalf of the complainant, that the item on the debit side, "$410,615.39, bills payable," includes promissory notes amounting to $76,000, given by the company to their agents in exchange for accepted drafts drawn upon the agents, on account of manufactured goods consigned to them. Admitting such to be the fact, we do not perceive that it shows any inaccuracy in the items. It is abundantly proved, and it is beyond all doubt true, that the sum of the company's notes outstanding at the time was exactly what it was stated to be, and the company was liable for them all. The notes for $76,000, equally with the others, were to be paid, either in money or out of the proceeds of the goods in the agents' hands, if, from the latter, the value of the goods would be correspondingly decreased. But it is not denied that the statement credits the company with the full value of the goods in the agents' hands, without making any deduction for the drafts drawn against them. Besides, the evidence is that the drafts, in exchange for which the notes for $76,000 were given, were not in fact drawn against the consignments. They were accommodation acceptances. It is impossible, therefore, to conclude that this item on the debit side of the statement, to which the complainant now objects, was not

strictly accurate. No other inaccuracies in the debit side are alleged.

2. The next allegation of falsehood in the statement refers to the second item on the credit side, which is "cost of real estate, cassimere department, and amount paid Charles T. James's contract account, $310,006.40." This sum was made up of three items of expenditure, the first two not belonging to the contract with James for building the mill; namely, $13,140.60 paid for the real estate, $40,250.33, the cost of the cassimere department, and $256,615.11, the sum paid and charged to General James on his contract for building the mill. These items are admitted to have been correct. They amount to the sum set out in the statement. But it is argued the mill had cost more. It is said there was still due to General James on his contract the sum of $29,000, and he had a claim for extra work, it is said, amounting to $79,000 more. These two sums, it is argued, should have been added to the $310,006.40, to show the true value of the real estate, cassimere department, and mill. Yet it is obvious, had that been done, it would have been necessary to carry the two sums to the other side of the account, as debts due from the company, and charge them there. Thus the apparent indebtedness of the corporation would have been increased equally with the apparent increase of its assets, and the balance of the account would have remained as stated. But the objection made to the item misstates it or misapprehends it. Mr. Chapin, the treasurer, did not undertake to give the cost of the mill or its value. He had no better means for estimating the value of the mill or its cost than General James himself had, or than his assignee had. James had undertaken to build it, and to furnish it with all the machinery needed. He knew what the contract price for building it was, and he knew what extra work had been done. So did his assignee, who by the assignment had been directed to go on and complete what the assignor had undertaken to do. And when Mr. Frieze demanded a statement, it was a statement of the condition, standing, and accounts of the company. What was given in answer to the demand was not an estimate of the value of the mill (which was not demanded), but a true statement of the cost of the real estate and of the cassimere

department, together with the amount paid General James on his contract for completing the mill. The statement undertook to give nothing more, and there is no just reason for saying that in this particular the statement was in the least degree either fraudulent, imperfect, or untrue.

3. It is next contended that the fifth and sixth items on the credit side were incorrect, and fraudulently so. Those items are "wool, cotton, and supplies at mill, $190,692.17," and "delaines, cassimeres on hand, $149,516.74." But we do not find any considerable error in these sums, and certainly there is no evidence that the very small error we do find was intentional. In addition to the number of cases of delaines which the company had in the hands of Day, Owen, & Co. there appears to have been a mistake of eleven cases, of the value of $1,120. This is easily accounted for without imputing fraud. It was simply a clerical omission of one column in adding, a very common error in transcribing and footing up accounts. And the error is too small and too unimportant to justify any inference that it was not accidental. Apart from this, nothing has been adduced to show that the quantity and value of the wool, cotton, and supplies at the mill, together with the delaines and cassimeres on hand, including those in the hands of agents of the company, were not truly represented in the statement furnished to Frieze. No evidence whatever has been given to prove that there was any greater quantity; and that the value was not under-estimated plainly appears in the fact that the goods were very shortly afterwards sold, and brought less at the sales by several thousand dollars than the sum at which they have been estimated. Moreover, the correctness of the items assailed is vindicated by their correspondence with the inventory of the company, taken Dec. 31, 1852. It is said that the items do not correspond with the exhibition made by the trial balance of Dec. 31, and this is true; but the fact is unimportant, for the trial balance exhibited the cost, while the statement, corresponding with the inventory, exhibited what was supposed to be the market value.

These are all the particulars in which it has been contended the statement made to Frieze, the complainant's assignee, by the treasurer of the corporation, is false or fraudulent. Unsup-

ported as the attack upon the statement is, in our judgment, by any considerable proof, its substantial correctness is vindicated by convincing evidence. Not only does the testimony of Mr. Chapin, the treasurer of the company, prove it, but so also does that of Mr. Blodget, an experienced book-keeper, and that of Mr. Balch, an expert selected for the complainant to examine the books. Each of these witnesses affirms to the accuracy of the statement. And the complainant has produced no evidence to show that the company had more property, or property of greater value, or that its liabilities were less than represented to him.

It is true, as has been urged upon our attention, that the statement furnished concluded with the following: "The above is a true copy from the books," and this was not strictly correct. It was not a copy. There was in fact no such statement on the books. But most of the items were there, and the books were sufficient to enable the treasurer to make it up. If those items were correctly extracted, it was of no importance whether the statement was literally a copy or not. All that was probably meant was, that the particulars of the statement were taken from the books. Yet, if not, if the representation that the statement was a true copy from the books must be regarded as intentionally untrue, it cannot be said to have been hurtful to the complainant or to his assignee. What was asked for and what was needed was a statement of the condition and affairs of the company, to enable Mr. Frieze to estimate the value of the stock, and to take measures to have it bring its value at the impending sale. If the statement he got in response to his demand was a true representation of the condition of the company (which we think it substantially was), he cannot be said to have been deceived or defrauded by it; and his testimony in this case is that he does not think he was deceived. He submitted the statement to a judicious friend; and, acting on the advice of that friend, as well as on his own judgment, he agreed to the settlement that was made, — a settlement in which, as it seems to us now, he obtained all that the stock was then worth. It was not until nearly six years afterwards — no complaint of unfairness having been made to the defendants in the mean time — that this bill was filed to undo what had been done, and to pro-

cure a cancellation of the mutual releases and of the transfer of the stock to the corporation. Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them. We think no such case is now presented. The fundamental averment of fraud is not sufficiently sustained by proof. The bill must, therefore, be dismissed.

Decree reversed, and cause remitted with instructions to dismiss the bill.

MR. JUSTICE CLIFFORD dissented.

UNITED STATES *v.* SMITH.

1. By reason of its improper suspension of the work of a contractor, who had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use, the United States is liable in the Court of Claims for such damages as he has actually sustained.
2. The finding of facts by the Court of Claims, in the nature of a special verdict, is conclusive here, unless impeached for some error in law appearing in the record.
3. That court, in estimating damages, must be governed by the proofs submitted; but it is not required to set forth the elements of the calculation by which it arrives at its final result.
4. That court may, however, be asked by either party to state whether a particular item of charge or of damage is included in its finding, and, if so, to what amount.

APPEAL from the Court of Claims.

This was a suit by the appellee to recover damages for the suspension of his contract with the United States. By the contract the parties agreed: —

First, The said Joseph Smith, his heirs, executors, and administrators, agrees to superintend or cause to be superintended, and assist the soldiers in the erection of buildings at post of Beaver, Utah, according to plans and specifications; and agrees,

also, to supply or cause to be supplied all the skilled labor and material necessary for the erection of the buildings, in conformity with said plans and specifications.

Second, It is agreed that, for and in consideration of the faithful fulfilment of the above stipulations in all their parts, the party of the second part shall be paid by the United States, at the office of the A. A. Q. M., at post of Beaver, Utah, as follows, viz: —

Sixty-nine thousand one hundred and seventy-seven dollars ($69,177), provided that the United States is not liable for any amount beyond the sums appropriated for such purpose during the fiscal years in which the services are rendered. Payment to be made in instalments at completion of each separate building, or as soon thereafter as funds may be received for that purpose. The buildings to be inspected and accepted by the United States.

The Court of Claims found the following facts: —

I. On the 1st December, 1873, while the buildings were in progress of construction, the contractor was stopped by order of the post-commander, with the approval of the commander of the department, and all work under the contract was ordered to be suspended. The contractor objected to the work being stopped, and requested that he be released from his agreement, unless the work could go on. The matter was referred to the Quartermaster-General, and by him submitted to the Secretary of War. Pursuant to orders of the latter, the contractor was allowed to resume work. The period of suspension was from the 1st December, 1873, to the 3d February, 1874. The defendants have paid for the work done under the contract, but have not paid the damages occasioned by the suspension of the work.

II. On the 30th October, 1874, General Ord, commanding the Department of the Platte, referred the contractor's claim for damages caused by the suspension to the quartermaster of the post of Beaver, who had had entire charge of the work from the beginning to the completion thereof, with instructions to report as to the damages caused by "the unexpected stoppages and delays inflicted on the contractor, Smith, by the orders from Washington and department head-quarters; the exposed

and unfinished condition in which he was compelled to leave the buildings during winter storms; the remoteness of the place of building, where all skilled labor had to be provided from a great distance, and which was left sometimes unoccupied and unpaid for on the contractor's hands; the deterioration in value of material left exposed while waiting for orders to continue the work." The post quartermaster, under these instructions, reported the contractor's losses at $8,000, and the department commander approved the recommendation. The court finds the claimant's damages for the same to be $5,000.

III. During the progress of the work the contractor furnished and performed certain additional or extra work not required by his contract. But, on the inspection of the buildings before the final payment, it was found by the inspecting officer that the contractor had omitted to furnish and perform certain work required by the contract. It was subsequently agreed between the contractor and the defendant's officers that the extra work furnished should be received and stand in the place of that omitted by the contractor, and under and in pursuance of such agreement or compromise the contractor was paid the balance remaining due of the contract price.

Upon the foregoing findings the court decided as conclusions of law, —

1. The officers of the government charged with the care and supervision of the building to be erected by the claimant had no right to hinder or delay him in the proper performance of his work: and for the suspension thereof, ordered by such officers in the supposed interest of the government, the claimant should recover such damages as were the necessary consequence of the suspension; that is to say, such damages as would place him as nearly as possible in the same condition as he would have been in if he had been allowed to proceed without such interference, excluding therefrom, nevertheless, any loss or injury to his materials, which might have been prevented by the exercise of reasonable care and prudence on his part, in the storing, custody, and preservation thereof.

2. The estimate or allowance of damages for the suspension of the work made by the post quartermaster, under the instructions of the commanding officer of the department, does not

determine the amount thereof, and should be excluded by the court in making a computation of damages.

3. The extra work on the buildings done by the claimant in addition to that required by the terms of his contract, and the deficiencies under the contract, as determined by the inspecting officer who inspected the work before acceptance by the government, as provided by the contract, were proper subjects of compromise and set-off, and, having been so compromised and set off against each other before final payment, the claimant is concluded from seeking a recovery for the former.

Judgment was rendered for the claimant for $5,000, where upon the United States appealed here.

Mr. Assistant Attorney-General Smith for the appellant.

Mr. James Lowndes, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only questions presented in this case relate to the liability of the United States for damages growing out of the suspension of the work under the contract sued upon. In effect, the contract bound Smith to furnish the materials and erect the buildings, the labor being performed by the soldiers at the fort, except to the extent that skilled workmen were necessary. There was no time specified within which the work must be done, neither was there any power reserved by the United States to direct its suspension. Under such circumstances, the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this.

In *Clark's Case*, 6 Wall. 546, it was decided that the United States were liable for damages resulting from an improper interference with the work of a contractor; and in *Smoot's Case*, 15 id. 47, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied in the case of the *Amoskeag Company*, 17 id. 592. Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty

days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. In this respect, we cannot consider this case different in principle from that of Clark, *supra*.

The Court of Claims has found the amount of the damages to have been $5,000; that is to say, that sum, in its opinion, from the evidence before it, was necessary to place Smith in the same condition he would have been in if he had been allowed to proceed without interference, and not allowing any thing for loss or injury to his materials, which he might have prevented by the exercise of reasonable care and prudence.

This rule of damages, as an abstract proposition, is clearly right. Unless, therefore, there appears in the record some error growing out of the estimation of the amount, the judgment below should be affirmed.

By our rules in reference to appeals from the Court of Claims, rule 1, sect. 2, that court sends here its finding of facts as "established by the evidence, in the nature of a special verdict." The evidence is not sent up. This finding is conclusive, unless impeached for some error in law appearing in the record. Here, in effect, the error complained of is, that the court refused to state the items of its account of damages. This we have not required; and while, under the practice we have established, liberal provision should be made for the review of questions of law, it seems to us that in this case the claim of the United States goes beyond any thing we ought to grant. The court might with propriety have been asked to state in a finding whether a particular item of claim or of damage was included in its estimate, and, if so, what amount. To such a finding exception might in proper form be taken, and then we could be called upon to decide whether such an item was legally the subject of compensation in an action for damages. The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than

compensation for damages actually sustained can never be awarded against the United States.

In this case the United States asked the court to find (1) the amount of damage done to the building on account of exposure to the winter storms in its unfinished condition; (2) the amount resulting from the retention of the skilled labor, &c.; and (3) the deterioration in the value of materials. All these were legitimate subjects of inquiry by the court in making up its final estimate; but we know of no rule of law or practice which requires a court or jury to specify the elements of the calculation by which it arrives at its final result. In this case the court was not asked to say whether it included this or that supposed element of compensation in its judgment; but the only effort seems to have been to ascertain the items of calculation so as to determine whether the proof supported them. The whole contest evidently was as to the sufficiency of the evidence, not as to the liability of the United States if the facts as claimed were established by the proof.

In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proved. The court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proofs submitted. The result of the best judgment of the triers is all that the parties have any right to expect.

As the record presents the case, we see no error in the court below. *Judgment affirmed.*

UNITED STATES v. PHISTERER.

1. An officer of the army, who, under the Consolidating Act of March 3, 1869, is ordered from a military post, at which he is doing duty, to his home, to await orders, does not exchange his station, within the meaning of sect. 1117 of the Army Regulations.
2. The case is governed by sect. 1110 of such regulations; and under it the officer is entitled to an allowance of ten cents for each mile travelled by him in pursuance of his orders.
3. The home of the officer to which he is ordered is not a military station. A military "station" is merely synonymous with military "post." In each case it means not an ordinary residence, having nothing military about it, except

that one of its occupants holds a military commission, but a place where military duty is performed, or stores are kept or distributed, or something connected with war or arms is kept or done.

4. An officer so ordered is not, when at home awaiting orders, entitled to commutation for quarters and fuel. His home is not a "station," within the meaning of sect. 1060 of the Army Regulations.

APPEAL from the Court of Claims.

Mr. Assistant Attorney-General Smith for the United States.
Mr. Halbert E. Paine, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The present case is one of a class of which several are now pending in this court, and many more, it is understood, are before the Court of Claims.

The claimant was a captain of infantry in the United States army, and on the seventh day of January, 1870, by special order from the Adjutant-General's office, at his own request, was ordered home to await orders. This was done by virtue of the Consolidating Act of March 3, 1869. The claimant proceeded from Fort Bridger, Wyoming Territory, where he then was, to his home in New York City. On the 28th of February, 1870, he reported as waiting orders at that place, and afterwards as waiting orders at Littleton, N. J., which was then his home.

The claim now made is for mileage in travelling from Fort Bridger to New York, and for commutation for quarters and for fuel while thus awaiting orders.

The Court of Claims allowed the petitioner both for his mileage and the commutation for quarters and fuel during the period mentioned. The questions will be separately considered.

1. As to mileage.

Comment is made upon the circumstance that the claimant reported himself to the department as awaiting orders at the city of New York, on the 31st of January, 1870, specifying that place as his home, and that on the 31st of March following he reported himself at Littleton, N. J., specifying that place as his home. We see nothing in this that should prejudice the claimant's right of recovery. New York may well have been his home in January, and Littleton his home in March. It is not

extraordinary nor a ground of suspicion that an officer should change his place of residence. Whether he resided in New York or in New Jersey could make no difference in his position in the army, or in his liability or readiness to respond to any orders given to him. It was indeed important that he should keep the department advised of his residence, that he could be called upon when it was desired. This he did. The department made no objection to this change of residence at the time, nor does it place its refusal to pay the mileage upon this ground. We think the circumstance quite unimportant.

The effect of the order to proceed to his home and there to await orders, and the difference between this *status* and that of an officer "absent from duty with leave," was considered by this court in the *United States* v. *Williamson*, 23 Wall. 411. That decision secures to the officer his full pay while thus awaiting orders, and we find no occasion to correct any thing contained in it. We are still of the opinion that the officer was not absent on leave, but that he was awaiting orders at his home. It results also from this decision, that, in thus proceeding to his home, he was travelling under orders.

The provision relating particularly to the case we are considering is found in sect. 1109 of the Army Regulations, authorized and confirmed by the act of July 28, 1866. It is there provided that "an officer who travels not less than ten miles without troops, escort, or military stores, and under special orders in a case from a superior, or a summons to attend a military court, shall receive ten cents mileage." This means that he shall be entitled to an allowance of ten cents for each mile thus travelled. It is hardly denied that the claimant was travelling within the meaning of this regulation.

But it is contended that, under regulation, sect. 1117, the department was justified in withholding the allowance. That regulation is in these words: "When officers are permitted to exchange stations, or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves." If A. at one station and B. at another desire to exchange stations or regiments or companies with each other, and prefer a request to that effect, the provision assumes that

the commanding officer may, in his discretion, grant it; but, as no public interest is advanced by it, and it is consented to for the advantage or pleasure of the two officers, they must bear their own expense of transportation in making the exchange. This is just and reasonable.

We are inclined to think that it would be too narrow a construction of this provision to hold that it required that two officers should be concerned in the exchange. An exchange from one station to another station by the same officer at his own request, if found compatible with the public service, would be within the words of the rule, and apparently as much within its spirit as when the exchange was made by and between two officers.

But we are of the opinion that Captain Phisterer did not make an exchange of stations within the meaning of this regulation. In other words, although he left a military station at Fort Bridger, his home at New York, to which he went, did not become, and is not to be deemed, a military station. In the broadest use of language, no doubt the word "station" means a place or position; and it may be said that wherever a man, in pursuance of orders, stays or remains, he is stationed, and that if he is a military man, such place becomes a military station. This word (station) has a recognized and a different meaning under different circumstances. It is a technical word in church regulations, in the science of ecclesiology, in the civil law, in surveying, in railroad language, and in military science. See Richardson and Worcester Dict.

A "military station" is merely synonymous with the term "military post," and means a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded, — where something, in short, more or less closely connected with arms or war is kept or is to be done.

In the Army Regulations the two terms are often used convertibly. Thus, in the regulations of 1847, —

If a post or station should prove unhealthy, the troops may be removed, &c. 11, par. 57.

Whenever a military post or station shall be abandoned, the property should be turned over, &c. 11, par. 58.

Commanding officers of forts and stations on the sea-coast to aid in quarantine regulations. 11, par. 61.

The military force at any post or station in the Indian Territory shall be employed, &c. 17, par. 91.

Whenever an officer is ordered from one station to another, or for the performance of any duty, not being with troops, he shall proceed by the most direct route without unnecessary delay; nor is he under any pretence whatever, except that of sudden illness, to apply for leave of absence from the time he quits the station at which he receives the order until he has arrived at his place of destination. 45, par. 227.

Whenever such officer shall appear to have made unusual or unnecessary delay, he shall immediately report the cause to the commanding officer of the post. 45, par. 228.

It is a misuse of language to designate as a post or a military station a cottage in a country village, in no way distinguishable in its use or appointments from every other residence in the village, because one of the persons who lives in it is an officer in the army. There was no exchange of stations by Captain Phisterer, and, therefore, nothing to except his case from the general law which allowed him mileage for his travel in proceeding to his home.

2. The claim for commutation for quarters and commutation for fuel while at New York and New Jersey is to be considered.

Among the army regulations established by the act of March, 1863, are the following, under the head of quartermaster's department: Sect. 1064. "This department provides the quarters and transportation of the army, . . . fuel, forage," &c. "Barracks and quarters." Sect. 1066. "Under this head are included the permanent buildings for the use of the army, as barracks, quarters, hospitals, storehouses, officers' stables." Sect. 1068. "The number of rooms and amount of fuel for officers and men are as follows: . . . Captain, two rooms, one as kitchen; cords of wood, three-fourths or three per month, according to the season of the year." Sect. 1071. "No officer shall occupy more than his proper quarters, except by order of the commanding officer, when there is an excess of quarters at the station.". . . Sect. 1073. "Fuel issued to officers or troops

is public property for their use; what they do not actually consume shall be returned to the quartermaster, and taken up on his quarterly return." Sect. 1077. "An officer may select quarters occupied by a junior; but, having made his choice, he must abide by it, and shall not again at the fort displace a junior, unless himself displaced by a senior." Sect. 1080. "When public quarters cannot be furnished to officers at stations without troops, or to enlisted men at general or department headquarters, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market price delivered." . . . Sect. 1083. "Officers absent from their appropriate duties for a period exceeding six months, either with or without leave, shall not receive the allowances" mentioned. Sect. 1084. "Officers and troops in the field are not entitled to commutation for quarters or fuel."

The claimant bases his demand upon sect. 1080, above set forth. To maintain this claim, it must be held that Captain Phisterer, while at his home in New York and in New Jersey, was at a station without troops. That he was without troops is plain enough; but that his home on these occasions was not a military station, we have undertaken to show when considering his claim for mileage. The same construction of the word "station," which gives him his mileage, cuts off his claim for commutation.

We think the regulation we have referred to was not intended for a case like that we are considering; that is, where an officer is at his own home awaiting orders, and having no public duty whatever to perform.

Quarters are expected to be furnished by the government to its officers; when it cannot thus furnish, it allows them to be obtained otherwise, and pays a money compensation therefor, called commutation. This is upon the assumption, first, that the officers are actually engaged in the public service; and, second, that such quarters are necessary to the discharge of their duty. It is upon the latter idea that commutation for fuel and quarters is not allowed to officers when in the field. The duty there is public not only, but of the most necessary character; still, apartments, kitchen, and offices are not there necessary, and cannot be commuted for.

We are of the opinion that the claimant was not at a station, in the sense that he is entitled to public quarters, or to a compensation in the form of commutation for rooms and apartments or fuel, obtained or supposed to be obtained in lieu of those expected to be furnished by the government. In making this allowance, we think the Court of Claims erred.

The briefs submitted contain suggestions of what would be the result in various cases, which, it is said, may arise under these regulations. Our judgment is intended to be given upon the precise case before us, and upon no other. Should other cases be presented, the Court of Claims will give them the attention required, as will this court, should they come here. Both courts have business enough to occupy them, without anticipating cases which may never be presented.

Judgment reversed, and cause remanded with directions to enter a judgment awarding the claimant mileage, and denying him commutation for quarters and fuel.

NOTE. — In *United States* v. *Chilson*, *Same* v. *Rheem*, *Same* v. *Lynde*, cases in which the claims for commutation for fuel and quarters by officers ordered to their homes, under the act of March 3, 1869, were allowed by the court below, and which were argued by the same counsel as in that case, MR. JUSTICE HUNT delivered the opinion of the court, reversing the judgment of the Court of Claims. At the same time and by the same counsel as in the preceding cases was argued *United States* v. *Mears*. It involved the question whether an officer ordered to his home, under the act of March 3, 1869, was entitled to his mileage. Mears, a paymaster, paid mileage to an officer so ordered. The government disallowed the item in his accounts, and he brought suit to recover the amount. The Court of Claims found in his favor; whereupon the United States appealed to this court. MR. JUSTICE HUNT, in delivering the opinion of the court, remarked: The officer was entitled to his mileage, and the payment was rightly made. *Judgment affirmed.*

CAMMEYER v. NEWTON.

1. This court finds that letters-patent No. 80,492, granted to William H. Cammeyer, bearing date July 28, 1868, for an improved portable and adjustable still-water dam, were not infringed by the defendant.
2. The claims embraced by the patent, and the nature and mode of operation of the invention which is therein described, and of the machine or apparatus used by the defendant in alleged violation of the patent, examined.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. Thomas P. Howe for the appellant.
Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Holders of valid letters-patent enjoy, by virtue of the same, the exclusive right and liberty of making and using the invention therein secured, and of vending the same to others to be used, as provided by the act of Congress; and the rule of law is well settled, that an invention so secured is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted. *Seymour* v. *Osborne*, 11 Wall. 516; 16 Stat. 201.

Inventions may be assigned before they are patented: and it appears that Samuel Lewis claims to have been the original and first inventor of the patented improvement; that he, without having applied for a patent, assigned all his right, title, and interest in the invention to William H. Cammeyer, one of the complainants; that the assignee made due application for a patent, and that the patent was duly granted to him for the term of seventeen years; and that the patentee, before the suit was commenced, assigned one undivided half part of the same to said Lewis, the other complainant, together with the like proportion of the claims and rights of action which had accrued by reason of any infringement of the patent by the making, use, or sale of the patented improvement.

Due evidence of the patent and the assignment was exhibited; and the complainants allege that the respondents have infringed the patent, as more fully set forth in the bill of complaint; and they pray for an account and for an injunction. Service was made; and the respondents appeared and filed separate answers.

Briefly stated, the defences set up in the respective answers are as follows: 1. That Samuel Lewis is not the original and first inventor of the patented improvement. 2. That the patented improvement is neither new nor useful, and was not the proper subject for a patent. 3. That they have never

infringed the patent by making, using, or selling the patented improvement. 4. That the use, if any, they have made of the patented improvement was done under the directions of the United States, and as their agents or officers.

Proofs were taken by both parties; and, the parties having been fully heard, the Circuit Court entered a final decree in favor of the respondents, dismissing the bill of complaint. Due appeal was immediately taken by the complainants to this court.

Engineers and practical operators have long known and still admit that the work of blasting rocks under water is attended with many and great difficulties. Efforts have been made to overcome those difficulties; but they have never been entirely successful, nor do the complainants pretend that the patented improvement will meet every requirement in that regard. What they allege is, that their assignor is the original and first inventor of a new and useful improved portable and adjustable dam for the purpose of producing still water in which to operate for the blasting and removal of obstructions in rivers and other watercourses.

Such obstructions, where they exist in rivers or in channels affected by the ebb and flow of the tide, have the effect to contract the watercourse and to accelerate the current or flow, and consequently to increase very much the difficulties of the operator in his endeavors to blast the rocks or to remove the obstruction, except in seasons of low water, or when the tide is down.

Difficulties of the kind almost insuperable, it must be admitted, do exist when attempting to remove such obstructions in large running streams or in deep channels affected by the tide, and that the description of the same given by the patentee in the introductory portion of his specification is not very much exaggerated. As evidence to show that the invention, if successful, will be of great public utility and importance, that part of the specification refers to different localities, where, from the nature of the bottom of the stream or channel, a coffer-dam could not be constructed, and where the drilling by hand from the surface would be impracticable, owing to the depth of the water and the strength of the current.

Means of a character to remove such obstructions, the specifi-

cation states, were unknown prior to the patented improvement, and that important water thoroughfares, for the want of adequate means to accomplish such an end, are either entirely or partially closed to vessels of large draught, which may, by the use of the patented machine, be converted into highways for the largest ships engaged in commerce and navigation.

Suppose the alleged improvement will effect the described results, or will even facilitate to a considerable extent the removal of such obstructions, all, it would seem, must concede its value and utility; and the patentee proceeds to state that the main object of the same is to enable workmen to continue their operations without suspension or impediment from the strength of the current, the ebb or flow of the tide, or the varying depth of the water. All these results the patentee professes to believe can be accomplished by the mechanism described in the specification and illustrated in the annexed drawings; but it is evident, from the language of the specification, that the supposed inventor had never put the apparatus which he describes to any practical use or test. Enough appears to justify the conclusion that he believed in the theory of the improvement, and that he felt much confidence that the described mechanism would work out the described results.

Having set forth the object and aim of the improvement, the patentee then proceeds to describe the apparatus by which they are to be accomplished, as follows: Two boats are prepared (double-enders, as shown), on one or both of which is an engine of requisite power, with propeller and machinery complete for moving the boat, raising the anchors, varying the depth of the dam, and operating the drills. These boats or hulls are connected by a substantial deck, which has an opening in the centre equal to the horizontal area of the dam, for the purposes of access, light, &c., for the diver. From the deck is suspended the telescopic or sectional portion of the apparatus, with the chains and attachments, all previously adjusted and ready to be drawn through their respective openings in the deck.

By the description it also appears that the manner of constructing the telescopic or sectional portion of the apparatus is to prepare a series of plates of galvanized iron, or any other proper material, of suitable thickness, and bend and fasten them

into the form shown in the drawings, which is that of an acute parallelogram, one sliding vertically within another, so as to offer the least possible resistance to the tide or current, thereby easing the work of the anchors, and contributing generally to the control of the apparatus.

Each division of the dam is bent inwards at its upper edge, and at its lower edge has a strip fashioned so as to prevent the sections from separating. Every section is likewise provided with four eyes or eyebolts, one at each side and one at each end, which serve as guides to the several sections while operating, the eyebolts on the bottom section being attached permanently to the chains through which the dam is operated, and the bottom section being also provided with four framed wheels or eyebolts through which the side anchor-chains pass, which are to be operated by windlasses, and which extend from the boats, similar to those shown for the operation of the dam above, through the eyebolts on the bottom section, and then outward to the side anchors. Chains extend directly from the boats to the side anchors, and from the ends of the boats directly to the end anchors, the dam being operated by windlasses.

Drills are provided which work in tubes, the lower ends of the tubes being fastened into braces attached to the bottom section of the dam. Tubes of full length, it is stated, are not deemed essential, as a section of sufficient height above the braces on the bottom section of the dam to prevent the drill from being entirely withdrawn from the tube during a stroke, is for some reasons to be preferred, if the tube is properly set with a rocking joint in the lower brace.

Self anchors, so called, are also provided, which are bars of iron formed and moving in sockets, as shown in the drawings, and which, by virtue of their length and free play, adapt themselves to the irregularities of the bottom, and take a rigid and steady hold during the process of drilling. Anchors of the kind are connected with the deck, so as to be taken out of the way when desirable, and the telescopic apparatus is suspended from the deck by four links and bolts, and the several chains are drawn through their respective openings and attached to their proper windlasses.

All the appurtenances, including the boats and dam, being

complete and the sliding sections closed, the machine is taken to the spot where it is intended to begin work, the anchors are put out, and the dam is lowered.

Intelligent description of the mode of anchoring the machine and putting it in operation is also given in the specification, as follows: 1. An anchor is let go and its cable paid out to its full length, the boat moving till the anchor takes hold and the chain is taut. 2. Then the other anchor is dropped and the two chains taken up, till the floating structure is held steadily by the two anchors. 3. The side anchors are next launched from a lighter or attendant boat. 4. When these anchors are placed, it is suggested that the diver should be sent down to explore the bottom, to see whether any change of position is desirable. 5. Change may be made in any direction by letting out one cable and taking up another, if it appears that the change will give the self anchors a better face for work when the dam is lowered. 6. When the drills have penetrated to the desired depth, they are withdrawn, and the diver goes down and inserts the charges. 7. The apparatus is then removed and the charges fired, when the machine is replaced as before, and the work continued.

Four claims are made in the specification, as follows: 1. The construction and arrangement of a portable and adjustable dam in sliding or telescopic sections, in the manner and for the purposes described. 2. The combination of the self anchors with the dam, in the manner and for the purposes set forth. 3. The combination of the boats, supports, or floats with the dam and the arrangement of anchors to hold the boats in position, in the manner and for the purposes described. 4. The combination and arrangement of windlasses, chains, and boats with the dam, so that by the construction thereof a series of drills may be operated within and enclosed by the dam, in the manner and for the purposes described in the specification.

Persons seeking redress for the unlawful use of letters-patent in which they have an interest are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors, and that the same have been infringed by the party against whom the suit is brought. Both of these allegations must be proved by the party instituting the suit;

but the patent, if introduced in evidence by the complainant, affords a *prima facie* presumption that the supposed inventor is the original and first inventor of the patented improvement. Evidence to overcome that presumption is admissible, provided that notice of such defence is given in the answer, as required by the rules of equity practice. *Seymour* v. *Osborne*, 11 Wall. 516. Notices of the kind were not given in this case, and it follows that the *prima facie* presumption must prevail.

Infringement is alleged by the complainants, and the burden is upon them to prove the allegation, as it imputes a wrongful act to the respondents. Such an issue cannot be understandingly determined without first ascertaining the true nature of the invention as embodied in the claims of the patent, when the same are properly construed in view of the descriptive portions of the specification.

Of all the claims of the patent, the first is by far the most important, and embraces all that is embodied in the other three. It is the construction and arrangement of the patented improvement called in the claim a portable and adjustable dam in sliding or telescopic sections, in the manner and for the purposes set forth in the specification.

Argument to show that the dam is to be suspended from the main deck is unnecessary, as the statement is three times repeated in the specification of the patent: 1. Figure 3 of the drawings, the specification states, shows the manner of suspending the dam from the main deck. 2. It is stated that the deck has an opening in the centre equal to the horizontal area of the dam, and that from the deck the telescopic or sectional portion of the apparatus is suspended. 3. That the telescopic apparatus is suspended from the deck by four links and bolts.

Beyond question, these references show that the patentee, when he claims the construction and arrangement of a portable and adjustable dam in sliding or telescopic sections, means a dam suspended from the deck when in use, and intends to be understood that such suspension of the dam, in the manner and by the means shown, is a necessary element of the claim.

Evidently the sections are not only free to slide in the manner described, but when the dam is in use the sections are to adjust themselves to varying depths of water, such as are

caused by the ebb and flow of the tide, which has the effect to vary the distance the dam is suspended from the bottom, showing that the top section must at all times be connected with the boat by links and bolts, as stated in the specification, or by equivalent means, and that the bottom section must be permanently connected or attached by chains or equivalent means, with a hoisting apparatus arranged on the boat.

Unless the top section is connected with the boat, the letting down of the bottom section will cause all the other sections to go down with it, and they will not be opened out telescopically, as described by the patentee. On the other hand, if the top section is connected with the boat, and the bottom section is not connected with the hoisting apparatus on the boat, the dam cannot be lifted, and the bottom section will always rest where the machine is placed; or, if the water is deep enough, all the sections will remain extended to their full length, showing that no dam constructed and arranged in the manner described in the descriptive portion of the specification can be within the first claim of the patent, unless the sections are free, at all times when the dam is in operation, to slide on each other, nor unless the top section is attached to or suspended from the boat, nor unless the bottom section is connected with a hoisting apparatus on the boat.

2. Self anchors combined with the dam constitute the second claim, which is merely a subdivision of what is embodied in the first claim. Viewed in that light, it will not be necessary to enter into any extended explanation as to its scope and signification.

Remarks already made show that the dam with telescopic sections was to be self-adjusting to tidal and other variations in the depth of the water where the machine is to be operated, and it is equally clear that the self anchors must be free to slide in their sockets with the rise and fall of the bottom section, in order that they may always rest on the bottom where the machine is placed for operation. Unless the bottom section is free to slide on the self anchors, should the bottom section be raised by an increase in the depth of water, it would raise the lower ends of the self anchors from the bottom, and might stop the working of the drills, which

shows that the self-adjustment feature of the anchors is necessary to maintain the connection of the dam with the bottom, for the reason that the dam is suspended from the deck, and that the connection of the dam with the bottom is liable to be severed by the receding of the boat from the bottom, as the tide rises beyond a depth equal to the extreme extent of the sections, showing that the feature of self-adjustment in the self anchors is inseparable from the feature of the suspension of the telescopic dam from the boat, sufficient explanation of which has already been given.

Much aid has been derived from the very able opinion of the district judge in defining the nature and mode of operation of the patented invention as embodied in the first and second claims of the patent; and the court here also concurs with the district judge in the definition which he gives of the words "self anchors" and "dam," as used in the claims and specification. As there employed, the term "self anchors" means anchors capable of self-adjustment, by having at all times free play, because not attached to their sockets nor moving with the bottom section to which the sockets are attached, which sufficiently explains the difference between the word "anchor," as commonly used, and the term "self anchors," as used in the description of the patented apparatus.

Where the claim of the patent is for a combination, it is necessary to understand the meaning of the several devices of which the combination is composed. In the second claim, the combination is the self anchors with the dam, and the term "the dam," as there used, means the dam suspended from the boat, with the described devices to accomplish in its movement and operation the functions already explained, from which it follows that no combination can be held to be within the second claim, unless it be a combination of such self anchors with such a dam, constructed and arranged in the manner described, so as to allow of such self-adjustment in the self anchors.

Two other claims are annexed to the specification; but the language of those claims are sufficiently explicit to speak their own construction without any special exposition, nor is any special explanation necessary, in the view taken of the case, as the decision of the question of infringement must depend chiefly upon the first and second claims of the patent.

Before comparing the patented machine with the apparatus used by the respondents, it will be useful to advert briefly to certain other issues tendered by the respondents in their answers. Preliminary to that, it should be remarked, that the respondent first named in the pleadings is an engineer in the employment of the United States, and that the other respondents are his agents and employés in the same service. In their answers they separately deny: 1. That they have made, constructed, or used the alleged invention of the complainants, or any substantial or material part of the patented machine. 2. That they or either of them have ever originated or planned any infringement or violation of the complainants' patent. 3. That they ever claimed to be the inventors of a still-water dam or apparatus such as that described in the bill of complaint. 4. That they ever made a model of any invention belonging to the complainants, or ever caused any drawings of the same to be constructed for any purpose. They, or the principal respondent, admit that he invented and devised a machine or apparatus for use as a caisson coffer-dam and diving-bell in excavating and removing rocks at certain reefs in New York harbor, that the same was constructed by and at the public expense, and has since been used solely and exclusively in the prosecution of the work to which the principal respondent has been assigned by the public authorities.

Public employment is no defence to the employé for having converted the private property of another to the public use without his consent and without just compensation. Private property, the Constitution provides, shall not be taken for public use without just compensation; and it is clear that that provision is as applicable to the government as to individuals, except in cases of extreme necessity in time of war and of immediate and impending public danger. *Mitchel* v. *Harmony*, 13 How. 115; *United States* v. *Russell*, 13 Wall. 623.

Sect. 22 of the Patent Act provides that every patent shall "contain a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the said invention or discovery throughout the United States." 16 Stat. 201.

Agents of the public have no more right to take such private

property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this court, in which it is held that the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making him compensation. *United States* v. *Burns*, 12 Wall. 246.

Suppose that is so, then it follows that the decision in the case before the court must depend upon the question of infringement.

Four principal propositions are maintained by the respondents responsive to that charge: 1. That the caisson coffer-dam and diving-bell which they use is not a portable and adjustable dam constructed and arranged in sliding or telescopic sections, as described in the specification of complainants' patent. 2. That it does not contain any combination of self anchors or self-adjusting supports. 3. That there is not any combination of a boat or boats with the caisson coffer-dam or diving-bell which they use, nor is there any boat or boats used or combined therewith in any manner or for any purpose similar to those set forth in the specification of the patent. 4. That there is not any combination of windlasses, chains, or boats in connection or combined with the caisson coffer-dam or diving-bell used by the respondents.

Contracts, it seems, had been made for the removal of rocks in the channel of the New York harbor, and the record shows that the respondent made a report to the War Department, in which he described the difficulties and ascribed the want of success to the imperfections in the machinery employed. Attempt was made by him to construct an apparatus for the purpose; and it appears that he subsequently filed a *caveat* in the Patent Office for the same, called improvements in the mode of constructing a caisson coffer-dam and diving-bell for the purpose of conducting operations in waters with rapid currents. Authority was subsequently given to him by the War Department to construct an apparatus embodying the arrangement set forth in the *caveat* and his antecedent report, from which it appears that an iron dome is to be sunk on the rock

to protect the drills and the diver from the velocity of the current, which, though lowered and raised from a boat, is yet entirely disconnected therefrom, and is uncontrolled thereby when in position. Drill-tubes are arranged within the dome in which the drills work, being dropped by their own weight, and raised by connection with motive power on the boat.

Experimental use of the apparatus commenced late in the fall of 1870, and it was found to work successfully, and it appears that it was for some time in constant use, and that it is the use of the same which it is alleged infringes the complainants patent.

In that apparatus the dome is let down through the well-hole in the boat. Movable legs are provided for use when the bed is hard and uneven, which are attached to the lower edge of the dome, and fall by their own gravity until they bear on the bed in such a manner as to insure the horizontal position of the lower edge of the dome, — the legs being kept to their bearings by self-acting cams which hold them permanently in place. When the dome is properly located, it is then detached from the lowering apparatus, and becomes a structure firmly located on the bed of the channel, having no suspension from the boat or any floating structure. Of course the apparatus has drill-tubes, but they are fixed to the inside of the dome, and the drills are raised by lifting-engines on the boat and dropped to the work by their own gravity, working vertically and without friction, because the dome stands erect and immovable. Both the dome and the drill-tubes are unaffected by any motion in the boat, and the attachments to the drills being by loose connections, the action of the drills is also practically unaffected by such motion within the range to which it is limited by proper anchorage and by allowing sufficient play between the face of the well-hole and the side of the funnel, which projects up from the centre of the dome.

Without more, these suggestions are sufficient to show that the apparatus used by the respondents is substantially different from that of the complainants, for the following reasons: 1. Because the dome when in position for work is not suspended from the boat or any other floating structure. 2. Because the funnel of the dome in the respondents' apparatus, though it is

capable of being adjusted at different heights, is not and never was self-adjusting to varying depths of water. 3. Because it has no self anchors, free to slide and self-adjusting at all times while the apparatus is in use.

Prior observations are sufficient to show that these features in the apparatus of the complainants are necessary features in the operation of the patented improvement, as clearly indicated in the first and second claims of the patent; and, if so, they are abundantly sufficient to substantiate the proposition that the apparatus of the respondents is substantially different from the machine described in the complainants' specification.

Proofs were introduced by the respondents which showed that no apparatus such as is described in the specification of the patent was ever constructed and put into practical operation, and the evidence tends to show that the apparatus, if constructed as described, would be worthless.

Serious difficulty, it is apparent, would arise if the mode of anchoring the dam there described should be adopted, as its tendency certainly would be to render it impossible to work the drills with useful effect.

Discussion is scarcely necessary in respect to the third claim, as the very statement of it shows that it is not infringed by any thing in the apparatus of the respondents, as their apparatus has no anchors connected with the dome, nor which connect the dome with the boat, which is an essential feature of the third claim in the patent.

In order to make the dam an element of the combination set forth in the third claim, the anchors connected with the boat by chains passing through eyebolts on the bottom section of the dam must be included; and as the anchors so connected and operating are wanting in the apparatus of the respondents, it follows that it does not infringe the apparatus of the complainants.

Nor is it necessary to enter much into the discussion of the fourth claim of the patent, as it has already sufficiently appeared that the apparatus of the respondents has no chains connected with the dome, nor do the respondents operate the drills in the manner or by the means described in the complainants' specification. Instead of that, drill grooves in the complainants'

apparatus are all connected below with the bottom section of the dam, and that is connected with the boat by chains and a hoisting apparatus, and the upper section of the dam is fixed to the boat with the other sections hanging from it. Unlike that, the drills in the apparatus of the respondents are operated in reference to the rock without any chains connected with the dome, showing that the apparatus is substantially different from that of the complainants in respect to every claim of the patent.

Suffice it to say, without pursuing the examination, that we are all of the opinion that there is no error in the record.

Decree affirmed.

INMAN STEAMSHIP COMPANY v. TINKER.

So much of the act of the legislature of New York, passed May 22, 1862, amended April 17, 1865, as requires, with certain exceptions, all ships or vessels which enter the port of New York, or load or unload, or make fast to any wharf therein, to pay a certain percentage per ton, to be computed on the tonnage expressed in the registers of enrolments of such ships or vessels respectively, is in violation of the Constitution of the United States, and therefore void.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This was a bill in equity filed by the appellant for an injunction to restrain the appellee, the captain of the port of New York and his successors in office, from collecting a fee of one and one-half per cent per ton, to be computed from the registered tonnage of certain vessels entering that port, pursuant to sect. 6, c. 487, of the acts of the legislature of the State of New York, entitled "An Act defining and regulating the powers, duties, and compensation of the captain of the port and harbor-masters of the port of New York, passed May 22, 1862, three-fifths being present. Amended April 27, 1865."

That section is as follows: —

"The following fees shall be collected under this act, and no others: All ships or vessels of the United States of one hundred tons burden or more, except lighters, tugs, barges, and canal-boats,

sound and river steamboats employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the said port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one-half of one per cent per ton, to be computed from the tonnage expressed in the registers of enrolments of such ships or vessels respectively; all other foreign ships or vessels which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton, to be computed on the tonnage expressed in the registers or documents on board. Where difficulties arise between vessels of less than one hundred tons burden, and the captain of the port or a harbor-master shall be called upon to settle the same, the vessel, canal-boat, barge, or lighter in fault shall pay two dollars. Such fees shall be paid by the masters, owners, or consignees of such ships or vessels, at the office of the captain of the port, or to persons authorized by him to collect the same, within forty-eight hours after the arrival of such ship or vessel. In default of such payment, the same having been duly demanded, such masters, owners, or consignees, on whom such demand shall have been previously made, shall pay double the amount of such fees, to be sued for and recovered, in the name of the captain of said port, in any court having cognizance thereof. All fees under this act shall be paid to the captain of the port, or upon his written order; and he shall have power to employ the necessary assistance in making collections of the same, at an expense of not exceeding five per cent upon the amount collected, which expense shall not be considered as the ordinary expense of the office. The captain of the port shall have power to designate some harbor-master as his deputy, who may, during his absence, or in case of a vacancy in his office, perform all the duties belonging to the office of captain of the port; and the acts of said harbor-master, so performed, shall be valid and binding."

The bill alleges that the complainant, the Inman Steamship Company, a corporation created under the laws of Great Britain, is the owner of a line of steamships belonging to Liverpool, and running thence back and forth to the port of New York, three of which vessels in every five weeks arrive at and enter said port, and load and unload and make fast to a wharf therein; that on account thereof the defendant has heretofore exacted upwards of $125 every five weeks, or over $1,300 per annum, whether or not any services were rendered

by or required of him and the harbor-masters. The bill further alleges that the complainant, on failure so to pay such fee, is liable to be charged in double the amount, to have its vessels attached and seized, and to a multiplicity of suits on account thereof.

The defendant demurred to the bill generally, for want of equity. The court below sustained the demurrer and dismissed the bill; whereupon the complainant appealed to this court.

Mr. William M. Evarts and *Mr. Francis Lynde Stetson* for the appellant.

The sixth section of the act under which the fees in question are collected is a regulation of commerce, and therefore unconstitutional and void. *Henderson* v. *The Mayor, &c.*, 92 U. S. 259; *Cooley* v. *Board of Wardens*, 12 How. 299; *Gibbons* v. *Ogden*, 9 Wheat. 203; *Steamship Co.* v. *Port Wardens*, 6 Wall. 31; *Peete* v. *Morgan*, 19 id. 581; *State Tonnage Tax Cases*, 12 id. 204; *City of New York* v. *Miln*, 11 Pet. 102.

The act, without the consent of Congress, lays a duty on tonnage, and is, therefore, in violation of sect. 10 of the first article of the Constitution. *State Tonnage Tax Cases*, *supra*; *Steamship Co.* v. *Port Wardens*, *supra*; *Peete* v. *Morgan*, *supra*; *Cannon* v. *New Orleans*, 20 Wall. 577.

Mr. Henry J. Scudder, *contra*.

The act in question is not a regulation of commerce within the intendment of the Constitution, but an exercise of a power reserved to the State for the proper government of persons within its jurisdiction. It is in aid and furtherance of commerce, and not to its hindrance. *Gibbons* v. *Ogden*, 9 Wheat. 591; *City of New York* v. *Miln*, 11 Pet. 102; *Cooley* v. *Board of Wardens*, 12 How. 299; *Steamboat New York* v. *Rea*, 18 id. 223; *Owners of the Brig James Gray* v. *Owners of the Ship John Frazer et al.*, 21 id. 184.

The control by a State of its internal affairs, with a view to the maintenance of order and public safety, does not infringe the powers of Congress to regulate commerce, although it may affect the subjects or instruments of commerce. *Brown* v. *Maryland*, 12 Wheat. 419; *United States* v. *Dewitt*, 9 Wall. 41; *Cooley* v. *Board of Wardens*, *supra*; *Port Wardens* v. *Ship M. J. Ward*, 14 La. 293; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

The adaptation of the fees to a standard of tonnage is the most just and convenient method of measuring them. The act does not lay a duty of tonnage.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a bill in equity brought to enjoin the appellee from collecting a port charge imposed upon the vessels of the appellant in the harbor of New York, by an act of the legislature of the State, a copy of which is annexed to the bill, and made a part of it. The bill sets forth the following facts: The appellant is a foreign corporation, and the owner of three steamships, each of which enters the port of New York once within every five weeks. The vessels are respectively of the burden of 2,950 tons, 2,823 tons, and of 2,712 tons. All these vessels belong to the port of Liverpool, in England, and run between that port and the port of New York. The character and object of the act of the legislature complained of are indicated in its title, which is, "An Act defining and regulating the powers, duties, and compensation of the captain of the port and harbor-masters of the port of New York, passed May 22, 1862, three-fifths being present; amended April 17, 1865." The sixth section declares: —

"The following fees shall be collected under this act, and no others: All ships or vessels of the United States of one hundred tons burden or more, except lighters, tugs, barges and canal-boats, sound and river steamboats employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one half of one cent per ton, to be computed from the tonnage expressed in the registers of enrolments of such ships or vessels respectively; and all other foreign ships which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton, to be computed on the tonnage expressed in the registers or documents on board," &c.

In default of payment as prescribed, it is declared that the master, owner, or consignee, upon whom demand of payment

may have been made, shall pay double the amount of such fees, to be recovered in the name of the captain of the port. The amount which the appellant was required to pay, and did pay, was one cent and a half per ton upon the tonnage of their three vessels respectively upon every arrival of each one in the American port. The bill seeks to relieve them from this burden in future. The respondent demurred to the bill in the court below. The demurrer was sustained, and the bill dismissed. The case was thereupon removed to this court by appeal.

The following clauses of the Constitution of the United States are invoked in behalf of the appellant as sustaining the bill: —

ART. 1, SECT. 10. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

"No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

It is not claimed that Congress ever consented to the passage of the act of 1862, or of the amendatory act of 1865.

It is insisted by the counsel for the appellant that the charge here in question is a regulation of commerce, which it was not competent for the State to prescribe, and also a tonnage duty, which the State was forbidden to impose.

Our remarks will be confined to the latter proposition.

The classification of the powers of the national government, the several categories into which they may be resolved, and the rights and powers of the States in our complex system of polity, have been so often considered by this court, that it is unnecessary upon this occasion to re-examine the subject. *Gilman* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 id. 236.

Tonnage, in our law, is a vessel's "internal cubical capacity in tons of one hundred cubic feet each, to be ascertained" in the manner prescribed by Congress. Act of May 6, 1864, 13 Stat. pp. 70, 72; Rev. Stat. U. S. 804, § 4153. "Tonnage duties are duties upon vessels in proportion to their capacity." Bouv. Law Dict., "Tonnage."

The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: "Tonnage (*tonnagium*) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV. c. 3; 6 Hen. VIII. c. 14," &c. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself.

In this law of the State there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.

The charge is applied wholly irrespective of the *ad valorem* principle.

If either of the three vessels of the appellant was new and making her first voyage, and another of the same tonnage was making her last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule to both. The rate of payment, and the amount to be paid, would, in both cases, be the same.

The act makes a discrimination. To one class of vessels it applies the rate here in question, to another class double that rate, and to yet another class none at all. Those belonging to the latter are wholly exempted.

We think a clearer case of the imposition of a tonnage duty than is presented in the record before us can hardly be imagined. If the law had been passed by Congress instead of the State, and the charge imposed had been expressly designated a

tonnage duty, its character as such could not appear in a stronger light. But the name is immaterial: it is the substance we are to consider.

It does not advance the argument in behalf of the appellee to maintain that the regulations prescribed by the act are necessary and proper in the port for which they are provided. It is not our purpose to examine them, except as to the proposition in hand. It may be that, aside from the imposition of this tax, they contain nothing exceptionable, and that in all other respects they are wise and well considered. Similar provisions, varying according to local circumstances, exist at all important points throughout the world whither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say, they are well nigh vital to commerce itself. It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes may be made liable by the laws of such State for all reasonable and proper port charges. This is but a fair return for the benefits received. But such charges must not be repugnant to the Constitution of the United States. Any conflict is fatal to them. The warrant for such competent legislation may be found in that immense mass of police and other powers which the States originally possessed, which they have not parted with, and which still belongs to them; or it may in some cases be found among those which the States may exercise, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance until the occasion for its exercise shall recur. *Ex parte McNeil*, 13 Wall. 236.

"Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Const. amend. 10.

The State, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the Constitution. In that particular the law is, therefore, void. This view is sustained by the rulings of this court in the *State Tonnage Tax Cases*, 12 Wall. 204, and *Cannon* v. *New Orleans*, 20 id.

577. See also *Steamship Company* v. *Port Wardens*, 6 id. 31, and *Peete* v. *Morgan*, 19 id. 581.

The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs.

The commerce clauses of the Constitution had their origin in a wise and salutary policy. They give to Congress the entire control of the foreign and inter-state commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such commerce goes, the power of the nation accompanies it, ready and competent, as far as possible, to promote its prosperity and redress the wrongs and evils to which it may be subjected. It was deemed especially important that the States should not impose tonnage taxes. Hence the prohibition in the Constitution, without the assent of Congress previously given. The confusion and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson upon the subject taught by the law before us is an impressive one.

How the charges, which it is conceded the State may impose, must be shaped in order to be valid, is a subject which it is not within our province to consider, and in regard to which it would not be proper for us to express any opinion. We decide only the point before us.

Decree reversed, and cause remanded with directions to proceed in conformity to this opinion.

MR. CHIEF JUSTICE WAITE did not sit in this case, nor take any part in its decision.

FOSTER v. MASTER AND WARDENS OF THE PORT OF NEW ORLEANS.

The act of the legislature of Louisiana, approved March 6, 1869, in relation to the survey of the hatches of every sea-going vessel arriving at New Orleans, and of the damaged goods coming on board of her, &c., being a regulation of commerce with foreign nations and among the several States, is in violation of the Constitution of the United States, and therefore void.

ERROR to the Supreme Court of the State of Louisiana.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. H. J. Leovy* for the plaintiff in error. No counsel appeared for the defendants in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This controversy has arisen out of an act of the legislature of Louisiana, approved March 6, 1869. By the first section it was made the duty of the master and wardens of the port of New Orleans to offer their services to make a survey of the hatches of all sea-going vessels which should arrive at that port, and a penalty was prescribed for the neglect of this duty. The second section declares "that it shall be unlawful for any person other than the said master and wardens, or their legally constituted deputy, to make any survey of the hatches of sea-going vessels coming to said port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates on orders for sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for said master and wardens to do and perform; and the person doing such illegal and forbidden acts, his instigators and encouragers, shall be liable and bound to pay *in solido* to the said master and wardens $100, with damages and costs, for each of said illegal and forbidden acts so done."

The petition avers that Foster resides in the city of New Orleans, and has been and is continually violating the provisions of the act by making surveys of the hatches of sea-going vessels arriving at that port, and of damaged goods, and has

been and is engaged in acting as, and performing the duties which belonged to, the master and wardens of the port.

An injunction was prayed for. It was granted by the lower court, and the judgment was affirmed by the Supreme Court of the State. A writ of error was thereupon sued out by Foster, and the case is thus brought before this court for review.

The defendants in error have failed to enter their appearance, and no brief in their behalf has been submitted. We shall, therefore, devote but few remarks to the case.

The Constitution of the United States, art. 1, sect. 8, gives to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

That the provisions of this act are regulations of both foreign and inter-state commerce is a proposition which requires no argument to support it. They are a clog and a blow to all such commerce in the port to which they relate. Their enactment involved a power which belongs exclusively to Congress, and which a State could not, therefore, properly exercise. In *Steamship Company* v. *Port Wardens*, 6 Wall. 31, it was held that a statute of a State enacting that the master and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform service or not, for every vessel arriving in that port, was a regulation of commerce, and was unconstitutional and void. If the constitutional objection was well taken there, *a multo fortiori* is it fatal here. The act is not, in the sense of the Constitution, an inspection law. The object of such laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers. *Gibbons* v. *Ogden*, 9 Wheat. 203; *Brown* v. *Maryland*, 12 id. 419; *Clintsman* v. *Northrup*, 8 Cow. 46; Bouv. Law Dict. "Inspection;" Story's Const. sects. 1017. 1024; *Neilson* v. *Garza*, 2 Woods, 290. The purpose of this act is to furnish official evidence for the parties immediately concerned, and, where the goods are damaged, to provide for and regulate their sale. *Master and Wardens* v. *Ship Hawes*, 6 La. Ann. 390.

Besides the unreason and the oppressive character of the

act as regards ship-owners and consignees, it is an invasion of the rights of persons outside of these classes. If such a monopoly, sustained by such sanctions, may be validly given to the master and wardens, why may they not also, at prices not agreed upon by the parties, nor according to the market value, but at rates arbitrarily fixed by law, be authorized exclusively to load and unload ships, to furnish them with all needful supplies, and to perform all the services of consignees, commission merchants, and ship-brokers, touching incoming and outgoing cargoes? Each of these imagined cases is a parallelism to the case before us, and only another step in the same direction.

We hold the statute to be void.

In expressing these views, we have no purpose to impugn any thing heretofore said by this court as to the power of the States to establish inspection, quarantine, health, and other regulations, within the sphere of their acknowledged authority. The constitutional validity of such regulations is as clear as the power of Congress to establish regulations of commerce. It is no objection to the former that both operate upon the same subject. *Gilman* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 id. 236.

Judgment reversed, and the cause remanded with directions to dismiss the petition.

EX PARTE JORDAN.

Subsequently to a decree *pro confesso*, additional parties were, by leave of the court, permitted to intervene as defendants, in the same manner and with like effect as if named in the original and supplemental bills. The case was then referred to a master, who computed, ascertained, and reported the amount of indebtedness, &c.; whereupon the court, after finding certain facts and overruling the exceptions of such intervening parties to his report, passed a final decree, but denied their right to an appeal therefrom. *Held*, 1. That they had that right. 2. That, to enforce it, a *mandamus* lies from this court.

APPLICATION for a *mandamus* to the Circuit Court of the United States for the Southern District of New York, to compel the allowance of an appeal from its decision.

The New York, Oswego, and Midland Railroad Company,

July 1, 1869, executed a mortgage on its railroad, &c., to secure an issue of bonds amounting to $8,000,000. Stevens, Opdyke, & Hewitt, trustees under this mortgage, on or about Nov. 1, 1873, commenced a suit for its foreclosure in the Circuit Court of the United States for the Southern District of New York. To this suit the railroad company, Delos DeWolf, trustee, William H. Macy, trustee, and the Mercantile Trust Company, trustee, were originally the only defendants. Receivers were appointed Nov. 18, 1873; and on the same day, for the purpose of providing money to pay debts owing to employés, and for certain other specified objects, the receivers were authorized to issue from time to time certificates of indebtedness to an amount not exceeding in the aggregate $1,425,000, bearing interest at the rate of seven per cent per annum, and, unless previously discharged, to be paid out of the moneys realized upon the foreclosure equally with any other liabilities incurred by them in the administration of their receivership. Dec. 23, 1873, a further issue of like certificates was authorized, for the purchase of equipment and the payment of rental on leased lines.

In due time an order was regularly entered, taking the bill as confessed. The receivers from time to time filed their accounts; and these were referred to a master, who reported thereon April 29, 1875. Upon the filing of this report the following direction was given by the circuit judge: "The report may be confirmed, but at present I think no further order should be entered."

June 29, 1875, Conrad N. Jordan, Henry Amy, Edward Livingston, Frederick P. James, John P. Crosby, and Nathaniel A. Cowdrey, holders, or the representatives of holders, of bonds secured by the mortgage, filed a petition for leave to intervene in the prosecution or defence of the suit, for the protection of the interests they represented. Upon this petition the following order was made, June 30, 1875:—

"It is hereby ordered that the said petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests, and the interests of those whom they represent, and to that end to appear in the suit within three days, as defendants, in the same manner and with like effect as if they were named in

the original and supplemental bills as defendants having or claiming an interest: *Provided*, that said petitioners all appear by the same solicitor or solicitors. This order to be without prejudice to proceedings already had; but this is not to be construed as depriving the petitioners of leave to apply for a rehearing or review of any order heretofore made, upon due notice to the parties interested."

About the same time a similar petition was presented by John E. Williams and Theodore Houston, and they were admitted upon the same terms.

July 13, 1875, the cause coming on for hearing, the complainants submitted a proposed form of final decree, and the defendants' various amendments thereto. The hearing was postponed until Aug. 4, when a further postponement took place until Sept. 15, and the master was directed "to compute, ascertain, and report to the court, on or before the eleventh day of September, 1875," among other things, "the amount of certificates of indebtedness and notes issued by the receivers under the authority of the court, classifying them so as to show the dates of and authority for their issue, and the purpose of such issues respectively, and to whom issued by the receivers, and the aggregate amount of principal due thereon, with interest computed to Sept. 15, 1875; . . . also what leases have been made to the mortgagor or receivers, and the dates and terms thereof; also what rents have accrued under the terms of such leases and have not been paid."

The time for taking proof by the master having been extended, his report was not made until Nov. 13. To this report exceptions were filed by Jordan, James, Houston, Williams, Livingston, Amy, and Crosby, Jan. 5, 1876. These exceptions related to the amounts allowed for outstanding receivers' certificates, and to different railroad companies on account of their leases.

The cause at last came on for final hearing, Oct. 2, 1876, among other things, upon the exceptions to the master's report "filed by defendants Conrad N. Jordan and others on the 5th of January, 1876," and after argument, among others, by "Mr. F. N. Bangs, of counsel for the defendants, Conrad N. Jordan, Henry Amy, John P. Crosby, Edward Livingston, Frederick P. James, and Nathaniel A. Cowdrey," a decree was entered

finding the amount due upon certain detached coupons, upon the bonds and attached coupons, and upon the receivers' certificates, and directing the mortgaged property to be sold, and the proceeds applied to the payment of the sums so found due.

The present petitioners, claiming to be aggrieved by certain specified orders made in the cause previous to their admission as defendants, and also by so much of the final decree as directs the payment of certain designated coupons, and of the receivers' certificates, and by certain other provisions of the decree which are specially stated, on the second day of October, 1876, in open court, prayed an appeal to this court "from so much and such parts of the decree" as they claim to be aggrieved by. This was denied, for the reason that the court was of the opinion "that the said defendants cannot appeal from the decree, because the bill of complaint herein and the supplemental bill have been taken as confessed as against them."

Afterwards the petitioners again applied to the circuit judge for the allowance of an appeal from the same parts of the decree, and tendered good and sufficient security to perfect the appeal; but it was refused.

Thereupon this application was made for a *mandamus* directing the Circuit Court to allow the appeal as asked for.

Mr. F. N. Bangs for the petitioners.
Mr. William M. Evarts, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think that an appeal should have been allowed in this case. The petitioners were defendants in the suit when the final decree was rendered. They were directly interested in what was then decided. The allowance of an appeal under sect. 692, Rev. Stat., follows of course, if prayed for by one who has the right to it. The language of the statute is, "*shall* be allowed," which means "*must* be allowed," when asked for by one who stands in such relation to the cause that he can demand it. The question upon such an application is not what will be gained by an appeal, but whether the party asking it can appeal at all.

It is true that the petitioners were not parties to the suit until after the bill was taken as confessed; but it is clear that a decree *pro confesso* did not end the case, because before the final decree was rendered it was found necessary to have a reference to a master, "to compute, ascertain, and report." Before the master could comply with this order proof had to be taken; and the original time given him to report was extended for that purpose. When this reference was made, the petitioners were defendants and actors in respect to the litigation. They certainly had the right to contend before the master, and to except to his report. This they did; and their exceptions were overruled. Even the report of the master did not put the case in a condition for a final decree. The amount due upon the bonds and coupons had still to be ascertained. That was done by the court, and stated in the decree. Against these findings, certainly, the petitioners were in a condition to contend, and, if to contend below, to appeal here. It will be time enough to consider what relief they can have under their appeal when the case comes up.

While complaint is made of interlocutory orders entered in the progress of the cause, the appeal lies and was asked only from the final decree. Whatever comes here comes through such an appeal. When the case gets here, the petitioners may not be allowed to go behind orders actually made by the court as to the administration of the property before they were admitted to defend, but the case was certainly open to them, when they came in, as to all other matters involved.

The exceptions of the petitioners were not filed until after the expiration of one month from the time of filing the master's report. Under equity rule 83 the complainants could have insisted upon a confirmation of the report by reason of this default at the next rule-day after it occurred. But they did not see fit to do so. The exceptions were received out of time without objection, and acted upon by the court. This was a waiver of the default.

A writ of *mandamus* will be issued directing the Circuit Court to allow the appeal asked for, as of Oct. 2, 1876, and it is so *Ordered.*

SELMA AND MERIDIAN RAILROAD COMPANY v. LOUISIANA NATIONAL BANK OF NEW ORLEANS.

Where, by reason of the failure of the appellant to enter into an undertaking to the clerk for the payment of his fees, or otherwise satisfy him in that behalf, the appeal has, upon motion of the appellee, been docketed and dismissed, the court will not, on motion of the appellant, at a subsequent term, set aside the order of dismissal, and grant leave to file the record and docket the cause.

MOTION for leave to set aside an order dismissing an appeal from the Circuit Court of the United States for the Southern District of Alabama, under the ninth rule at the last term, and for leave to file the record and docket the cause at the present term.

Mr. Philip Phillips for the appellant, in support of the motion.

Mr. Thomas J. Durant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The appeal in this cause was taken June 16, 1875. It was the duty of the appellants, therefore, under rule 9, par. 1, to file a transcript of the record with the clerk, and docket the cause within the first six days of the last term. The same rule provides, par. 8, that upon the filing of the transcript the appearance of counsel for appellant shall be entered. This was promulgated at the December Term, 1867, and has been in force since that time. 6 Wall. v. As early as the February Term, 1808, it was "ordered that all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on record," 4 Cranch, 537; but at the January Term, 1831, this was amended so as to read as follows: "In all cases the clerk shall take of the plaintiff a bond with competent security, to respond to the costs, in the penalty of $200, or a deposit of that amount to be placed in bank subject to his draft." 5 Pet. 724. This last order was continued in force substantially as originally promulgated until May 8, 1876, during the last term, when it was amended so as to read as follows: "In all cases the plaintiff in error or

appellant (on docketing a cause and filing the record) shall enter into an undertaking to the clerk, with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf." 91 U. S. vii.

In *Owings* v. *Tiernan's Lessee*, 10 Pet. 447, a transcript of the record was lodged with the clerk, Oct. 24, 1835; but he refused to file it or docket the cause until the fee bond was given, as required by the rule of 1831. At the January Term, 1836, the defendant in error moved that the cause be docketed and dismissed, and the plaintiff in error, that the transcript be filed and the cause docketed without the bond. The motion of the plaintiff in error was overruled, but leave was given him to docket the cause upon giving the bond; and it was ordered that if this was not done by March 1, the motion of the defendant in error to docket and dismiss be granted. Afterwards, in *Van Rensselaer* v. *Watts*, 7 How. 784, a record was lodged with the clerk early in 1848, but no fee bond given. At the January Term, 1849, the counsel for the appellant, having then filed the necessary bond, moved the court to direct the clerk to docket the cause as of the day the record was received by him; but this was refused, Mr. Chief Justice Taney saying, "This court consider the practice established by the decision in *Owings* v. *Tiernan*, 10 Pet., and do not wish to disturb it."

The transcript in this case was lodged with the clerk Oct. 5, 1875, but no fee bond was given and no appearance of counsel entered. An attempt has been made to show that neither the appellant nor its counsel knew that the security was required; but it does appear that as early as Nov. 25, 1875, both counsel and appellant did understand that $200 was required by the clerk for some purpose, and the agents of the appellant who had the appeal in charge were advised that they "would do well to attend to it without delay." No heed was given to this suggestion; and three months afterwards, Feb. 24, 1876, a motion to docket and dismiss was made and granted. The court continued in session until May 8, and no attention was given to the case by the appellants previous to the adjournment.

Without undertaking to determine what he might do in a case where an appeal had been dismissed through our own

mistake, we have no hesitation in deciding that the failure of this appellant to perfect its appeal has been because of its failure to comply with a rule of practice which has been rigidly enforced for more than forty years. In addition to this, we are not satisfied, from the showing made, that at least one of the counsel for the appellant did not have actual knowledge of the existence of the rule; and it is very clear that if, after the agents of the appellant were advised of the demand for security of some sort, they had exercised any diligence whatever in ascertaining what was actually required of them in the premises, they would have at once received the necessary information.

Motion denied.

TOWNSHIP OF EAST OAKLAND v. SKINNER.

1. This court concurs in opinion with the Supreme Court of Illinois, that the fifth section of the act of the general assembly of that State, approved Feb. 18, 1861, conferred no authority upon a municipal corporation to subscribe to the capital stock of the Paris and Decatur Railroad Company.
2. The township of East Oakland subscribed to that capital stock without being thereunto authorized, and its bonds, bearing date April 20, 1871, and reciting that they are issued in payment of such subscription, are void.
3. Where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit on fifty-four coupons cut from certain bonds issued by the township of East Oakland, Ill., in payment of its subscription of $75,000 to the capital stock of the Paris and Decatur Railroad Company.

The election authorizing the subscription was held Feb. 1, 1870, and the subscription made Aug. 15 of that year. The bonds bear date April 20, 1871. The other facts and the provisions of the statute applicable to the case are set forth in the opinion of the court.

The case was tried by the court below without a jury, and resulted in a judgment for the plaintiff for $9,207.32 and costs. The township thereupon brought the case here.

Mr. John M. Palmer for the plaintiff in error.

Mr. B. S. Greene, *Mr. D. T. Littler*, and *Mr. James C. Robinson*, *contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

The defendant in error brought this suit in the Circuit Court of the United States for the Southern District of Illinois against the township of East Oakland, to recover the amount of certain interest coupons issued with certain bonds by Charles Clement, supervisor, and as the agent of the said town, upon a subscription to the stock of the Paris and Decatur Railroad Company.

The Paris and Decatur Railroad Company is a corporation of the State of Illinois, organized under an act of the general assembly of said State, entitled "An Act to incorporate the Paris and Decatur Railroad Company," approved Feb. 18, 1861, with authority to construct, maintain, and operate a railroad from the town of Paris to the town of Decatur, in said State.

By the fifth section of said act it is provided that "said corporation shall cause books to be opened for subscriptions to the capital stock thereof, to be divided into shares of fifty dollars each, at such times and places as they may choose, and shall give at least thirty days' notice thereof by publication in a newspaper published in the town or city where said books may be opened; and if there be no newspaper published therein, then in the nearest newspaper thereto. It shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe any amount to the capital stock of said company."

It was by the authority of this section that the subscription we are considering was made, and the bonds and coupons issued in payment therefor. Did this language, "the agent of any corporate body," give power to a municipal organization to subscribe and to issue its bonds as was here done?

In the recent case of *Campbell* v. *The Paris & Decatur Railroad Co.* (not yet reported), the Supreme Court of Illinois passed upon the effect of this statute. After quoting the section as given above, the court say: "This is the only provision in the charter in reference to subscriptions by either persons or

corporations. It confers no power on municipal corporations to subscribe for such stock. The provision manifestly refers to private corporations when it authorizes agents to subscribe. It does not refer to counties, cities, towns, or townships, and cannot be held to embrace them. No power is conferred to call the election, or for the town officer to make the subscription, or to issue these or any other bonds." We have not been furnished with a copy of this decision, but it is referred to in the briefs of both parties. While its effect or conclusiveness is a subject of difference, the decision itself is not denied.

If the Supreme Court of a State gives construction to the language of a statute, and there have been no conflicting decisions, this court, as a general rule, follows the construction thus given. *Township of Elmwood* v. *Marcy*, 92 U. S. 289. It is said that this decision was *ex parte*, and that the decision was given on a made-up case, — that the contest was not a real one. There is no evidence of the truth of these assertions, and we do not well see how evidence of that character could be produced to us. If the decision is to be attacked on such grounds, the proceeding must be had before the court that made it, and upon notice to all interested.

We are, however, all of the opinion that the unreported case to which we have referred was rightly decided, and, as an original question, we concur in the opinion given by the Supreme Court of Illinois. We think the authority to "the agent of any corporate body" to subscribe for stock in the railroad company was not intended to include, and did not include, municipal corporations. It meant private and money-making, trading or business, corporations. It did not intend to give authority to any township, however remote from the road, to become one of its stockholders.

A provision of the Constitution of the State of Illinois, which took effect on the second day of July, 1870, positively prohibited a subscription to the capital stock of a railroad corporation by any county, city, township, or other municipality, unless such subscription had been authorized under existing laws by a vote of the people prior to the date mentioned.

The subscription in question was made after July 2, 1870.

Had it before that date been authorized under existing laws by a vote of the people of that town? The record shows that a vote of the people had before that time been taken; but it does not show that it was authorized by existing laws. There was no authority for submitting that question to the people; and its absence in the fifth section of the act incorporating the Paris and Decatur Company is a strong argument that municipalities were not intended to be included under the general designation of corporations.

We have held that a town cannot subscribe for stock in a railroad corporation unless it has the authority of the legislature for the act. The legislature usually requires the approval of the electors of the town, at an election for that purpose, as a condition to such subscription. Doubtless the legislature can impose or omit conditions, in its discretion. But when the sanction of a popular vote is required, it must be obtained. We are, therefore, compelled to hold that the subscription of the town of East Oakland had not been authorized under existing laws by a vote of the people prior to July 2, 1870.

We have held that there can be no *bona fide* holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a *bona fide* holding. *Judgment reversed*

UNITED STATES v. YOUNG.

1. The Court of Claims, by granting a new trial after rendering judgment, and while an appeal therefrom is pending here, vacates the judgment, and resumes control of the case and the parties.
2. In such a case, a writ of *certiorari* will not be granted to compel that court to send here the proceedings subsequent to the appeal; but the appeal will be dismissed.
3. After judgment shall have been finally rendered by the Court of Claims, the proceedings in which the new trial was obtained may be brought here by appeal for review.

ON motion of the United States to dismiss an appeal from the Court of Claims, and of the appellee for a writ of *certiorari*.

Mr. Assistant Attorney-General Smith for the United States.

Mr. W. W. McFarland for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

During the pendency of this suit in this court the Court of Claims, assuming to act under the authority of sect. 1088, Rev. Stat., has granted a new trial, and the United States now ask to dismiss their appeal. This we have often decided they have the right to do. *Latham's and Deming's Appeals*, 9 Wall. 145. In *United States* v. *Ayres*, 9 id. 610, the motion to dismiss was made by the appellee and resisted by the United States; but it was held "that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void;" and the appeal was consequently dismissed. The same principle was recognized in *United States* v. *Crussell*, 12 id. 175, *Ex parte Russell*, 13 id. 664, and *Ex parte United States*, 16 id. 699.

The appellee asks, however, that the cause may be retained, and that the proceedings under which the new trial was granted may be brought here by writ of *certiorari* for re-examination. Unless this can be done, he admits that the United States should be permitted to dismiss their appeal.

We have only such appellate jurisdiction as has been conferred by Congress, and in the exercise of such as has been conferred we can proceed only in the manner which the law prescribes. *Barry* v. *Mercein*, 5 How. 119; *Durosseau* v. *United States*, 6 Cranch, 314; *United States* v. *Curry*, 6 How. 113; *Ex parte Vallandigham*, 1 Wall. 251.

From the judgments of the Court of Claims appeals are allowed to this court (sect. 707, Rev. Stat.), but no provision has been made for writs of error. Consequently, we cannot proceed by writ of error to review the decisions of that court.

At common law, the writ of *certiorari* is used for two purposes: 1. As an appellate proceeding for the re-examination of some action of an inferior tribunal; and, 2. As auxiliary process

to enable a court to obtain further information in respect to some matter already before it for adjudication. It is for the last purpose only that the writ is employed in this court.

In the present case the writ is asked, not to bring here any part of the record of the Court of Claims as it existed when the appeal was taken, but to obtain a new record of a new proceeding which has been had since, and by which the judgment appealed from has been vacated and a new trial granted in the court below. The object is to inform us, not of what was done before the appeal, but of what has been done since. Our action under the appeal, however, is confined to what was done before; and, if we act at all upon what has been done since, it must be in consequence of some new jurisdiction to be acquired. From what has already been said, it is clear that, for such a purpose, we have no power to issue the writ.

The Court of Claims, by granting a new trial, has resumed control of the cause and the parties. This it had the right to do. Such a power may be somewhat anomalous, but it is expressly given; and every person, when he submits himself to the jurisdiction of that court for the prosecution of his claim, subjects himself to its operation. The proceedings under which the new trial was obtained are now a part of the record below, and, after judgment is finally rendered, may be brought here by appeal for review.

Motion of the United States to dismiss the appeal granted.
Motion for certiorari denied.

TOWN OF SOUTH OTTAWA v. PERKINS.

SUPERVISORS OF KENDALL COUNTY v. POST.

1. The Supreme Court of Illinois, by a long course of decisions, has held that, under the Constitution of 1848, a statute of that State is not valid unless the legislative journals show that it was passed by a majority of all the members elect in each house of the general assembly.
2. Except where the Federal Constitution and laws are concerned, the courts of the United States, in passing upon the Constitution and statutes of a State, conform to the settled construction of them by the highest State court;

and, when the latter holds a pretended act of the legislature to be void and not a law, the courts of the United States are bound to hold accordingly.

3. Any State may, by its Constitution and laws, prescribe what shall be conclusive evidence of its statutes; but, on general principles, the question as to the existence or non-existence of a statute is a judicial one, and, though framed in form as an issue in fact, must, when it arises in the courts of the United States, be decided by them, on evidence legally applicable under the laws of the State, without taking the advice of a jury on the subject.

4. A municipal corporation cannot, without legislative authority, issue bonds in aid of an extraneous object. Every person dealing in them must, at his peril, take notice of the existence and terms of the law which, it is claimed, conferred the power to issue them, no matter under what circumstances he may obtain them.

5. The plaintiffs in error, municipal corporations in Illinois, having issued the bonds in suit, by virtue of a pretended act of the general assembly, approved Feb. 18, 1857, which was duly published among the printed statutes of that State as a law, and, therefore, *prima facie* valid, were not estopped from denying its passage, notwithstanding the holder of the bonds was a *bona fide* purchaser without actual notice.

6. The Supreme Court of Illinois has decided, in two cases, that that act was never passed, and is not an act of the legislature of that State. This court concurs in that view, and also holds that no subsequent legislation has given any new force to the act, or any validity to the bonds issued, or the proceedings had, under it.

7. The act of Congress, prescribing the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, so as to take effect in every other State, has no bearing upon this case.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Argued by *Mr. P. Phillips* and *Mr. T. Lyle Dickey* for the plaintiffs in error, by *Mr. G. S. Eldridge* for Perkins, and by *Mr. D. T. Littler* and *Mr. H. Greene* for Post.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The first of these actions was brought by Perkins, the plaintiff below, to recover the amount due upon two negotiable bonds of the town of South Ottawa, in the usual form, for $1,000 each, made payable to the Ottawa, Oswego, and Fox River Valley Railroad Company, or bearer, in three years from July 1, 1869, with coupons for the semi-annual payment of interest attached. They each contained recitals as follows: —

"This bond is one of a series of twenty bonds, bearing even date herewith, each for the sum of $1,000, . . . and is issued in pursu-

ance of an election held in said town, on the eighth day of October, 1866, under and by virtue of a certain act of the legislature of the State of Illinois, approved Feb. 18, 1857, entitled 'An Act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads,' . . . at which election a majority of the legal voters participating in the same voted 'for subscription' to the capital stock of said railroad in the sum of $20,000, and to issue the bonds of said town therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application having been made to the town-clerk of the town, and said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid."

The second action was brought on a bond issued by the county of Kendall, in Illinois, bearing date the fourth day of May, 1869, in aid of the same railroad, and by virtue of the same act of the legislature, and containing substantially the same recitals, *mutatis mutandis*, as those in the Ottawa bonds, except that the election authorizing the issue of the bonds is stated to have been held on the thirtieth day of March, 1869. The facts in the two cases are, in other respects, substantially the same.

The only authority claimed for issuing these bonds is the act referred to in the above recital therein. If no such act was ever passed by the legislature of Illinois, the bonds are void. A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril. *Pendleton County* v. *Amy*, 13 Wall. 297; *Kenicott* v. *The Supervisors*, 16 id. 452; *St. Joseph Township* v. *Rogers*, 16 id. 644; *Town of Coloma* v. *Eaves*, 92 U. S. 484.

It is insisted on the part of the plaintiffs in error in these cases that the law relied on for authority to issue the bonds in question was never passed, no entry of its passage appearing on the journal of the Senate of Illinois.

The Constitution of Illinois, adopted in 1848, contains the following provisions: —

"ART. 3, SECT. 1. The legislative authority of the State shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

"SECT. 8. Each house shall keep a journal of its proceedings, and publish them. . . ."

"SECT. 21. . . . On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house."

The Constitution also provides that all bills passed shall be signed by the speakers of the two houses, and approved and signed by the governor, or, in case of his refusal, shall be repassed by a majority elected to each house. The general laws of the State provide for depositing all acts of the legislature, and the original journals of the two houses, in the office of the Secretary of State, who is charged with having them printed; and the printed statute-books are made evidence of the acts contained therein.

In the construction of the constitutional provisions above recited, the Supreme Court of Illinois, by a long course of decisions, has held that it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the Constitution.

As early as 1853, it was decided, in *Spangler* v. *Jacoby*, 14 Ill. 297, that it was "competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether. The Constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the Constitution that the signatures of the speakers and the executive should furnish conclusive evidence of the pas-

sage of a law. The presumption, indeed, is, that an act thus verified became the law, pursuant to the requirements of the Constitution; but that presumption may be overthrown. If the journal is lost or destroyed, the presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the Constitution, the presumption is overcome, and the act must fall."

This case was followed, in 1855, by *Turley* v. *County of Logan*, 17 id. 151. There, a law was supposed to have been passed at the session of the legislature in 1853, for the removal of the seat of justice of Logan County, by a vote of the people. In the fall after, a vote was taken, which resulted in favor of the removal. Turley and his associates then filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the House of Representatives the full number of times required by the Constitution, and so was no law. The fact being as alleged, the injunction was, in the first instance, allowed, but afterwards, in February, 1854, the same legislature met in extra session, and, on recollection of members, and by the manuscript notes of the clerk, the House of Representatives amended its journal so that it showed the bill had been read the requisite number of times. Thereupon the Supreme Court, when the case came there, while recognizing fully the authority of *Spangler* v. *Jacoby*, affirmed a decree dissolving the injunction and dismissing the bill, for the reason that it was within "the power of the same legislature, at the same or a subsequent session, to correct its own journals, by amendments which show the true facts as they actually occurred."

The same question was also considered by the same court in *Prescott* v. *The Trustees of the Illinois & Michigan Canal*, 19 id. 324, decided in 1857. There, Prescott and Arnold were entitled to purchase, at the appraised value, certain lots in Chicago, which had been appraised twice; and the point to be decided was, whether they should pay according to the first or second appraisal. The second appraisal was made under a

law supposed to have been passed Feb. 14, 1851, but which the journals showed had never in fact passed either branch of the general assembly. Accordingly, the court held, upon the authority of *Spangler* v. *Jacoby*, that the second appraisal was invalid, and that the parties had the right to purchase under the first.

In the case of *The Supervisors of Schuyler County* v. *The People*, 25 id. 181, which came before the court in 1860, it was objected that the Senate journal did not show that the bill incorporating the railroad company was read three times in that body before it was put on its final passage; but the court, while still approving *Spangler* v. *Jacoby*, held that the Constitution did not require the fact that the bill had been read three times to be entered on the journals, and, consequently, that the validity of the law could not be impeached on that ground.

In 1864, in the case of *The People ex rel. Barnes* v. *Starne*, 35 id. 121, an application was made for a *mandamus* to compel the treasurer of the State to countersign, register, and pay a warrant issued upon him in favor of Barnes, the relator, by the auditor of public accounts. The warrant was issued upon the authority of what was supposed to be a statute of Illinois, approved Feb. 14, 1863, as compensation for transporting and bringing home certain wounded soldiers belonging to the State; but it being shown that the journal of the House of Representatives did not contain entries to the effect that the bill was passed by a majority of the members elect, or that the vote was taken by ayes and noes upon the final passage, the *mandamus* was refused. In the opinion of the court the authorities are extensively reviewed, and the rulings in the previous cases reaffirmed.

These cases were all decided before the issue of the bonds sued on in this case. But since that time two cases have arisen under the very law now in question, in which the Supreme Court of Illinois has decided that it was never passed, and is not an act of the legislature of that State. The first of these cases *Ryan* v. *Lynch*, 68 id. 160, was decided in 1873. Certain tax-payers of the town of Ottawa sought to enjoin the tax-collector from collecting a tax which had been levied to pay interest upon bonds issued in aid of the Ottawa, Oswego,

and Fox River Railroad Company, upon the ground that the act under which the bonds were issued, that of Feb. 18, 1857 (the same which is now under consideration), had not been enacted in conformity with the requirements of the Constitution. At the hearing in the court below it was proved that the journal of the Senate did not show that the bill had ever passed that body. Upon this proof, the court, recognizing the authority of *Spangler* v. *Jacoby* and other cases which followed it, granted the injunction asked for. In the Supreme Court, on appeal, it was insisted that the decree ought to be reversed, because the bondholders had not been made parties. The objection was overruled, and the action of the court below affirmed.

Following this is the case of *Miller & Paddock* v. *Goodwin*, 7 Chicago Legal News, 294, not yet reported in the regular series of the reports of the State. It being shown in this case, as in *Ryan* v. *Lynch*, that the journals did not contain the requisite evidence of the passage of the law, it was again adjudged invalid. This was in January, 1875. An effort was made in this last case to impeach the transcript of the legislative journals; but it was unsuccessful. The court repeated what it had said in the case of *Ryan* v. *Lynch*, using this language: "The bill never became a law, and the pretended act conferred no power. It follows that the bonds were not merely voidable, but that they were absolutely void, for want of power or authority to issue them; and consequently no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax-payers from denying their legality." This opinion, it is true, was delivered after the trial of the case now before us. But it goes to show that, up to the very moment of that trial, there had been no vacillation in the State court as to the construction and effect of the Constitution of Illinois.

When the cases now under consideration came on for trial in May, 1874, the defendants below offered to prove, by the journals of each house of the legislature, that there was no entry in the same of the passage by the Senate of the act of Feb. 18, 1857. The testimony was objected to, and ruled out. Substantially the same questions were raised by demurrer to a plea. The ground of this decision seems to have been, that

the holder of the bonds was a *bona fide* purchaser of them without notice of any objection to their validity; that the first instalment of interest was paid at maturity; and, therefore, that the defendant was estopped from offering any evidence to show that the act was not passed, the same having been duly published among the printed statutes as a law, and being therefore *prima facie* a valid law: in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage.

We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

It is declared by the Judiciary Act as a fundamental principle "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Sect. 34. And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities.

If, therefore, the law in question had never been passed upon by the State courts, the courts of the United States would nevertheless be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the legislature void and not a law which the State courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State is binding upon those of the United States.

But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law, unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States.

This subject was fully discussed in *Gardner* v. *The Collector*. After examining the authorities, the court in that case lays down this general conclusion, "that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory

answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." 6 Wall. 511.

Of course, any particular State may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but, the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed.

Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice. He would, it is true, be precluded from doing so on another ground; namely, the want of any legislative authority in fact in the town to issue the bonds in question. Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.

Thus far we have not adverted to the argument attempted to be drawn by the defendants in error from the fact that the act in question was referred to in two subsequent acts of the legislature as an existing law. One of these was passed on the twenty-seventh day of March, 1869, entitled "An Act to amend an act, entitled 'An Act to incorporate the Ottawa, Oswego, and Fox River Valley Railroad Company.'" This act authorized the company to build a railroad from the town of Wenona to the city of Peoria; and, by the second section, it was enacted "that any city, county, town, or township near to or through which said road is now or may hereafter be located is hereby authorized to subscribe to the capital stock of said railroad, upon the terms and conditions prescribed in an act entitled 'An Act to authorize certain cities, counties, towns, and townships to subscribe to the stock of certain railroads,' in force Feb. 18, 1857." The title here recited is not the title of the act in question. It differs from it in several respects, though this was probably the one that was intended to be referred to. Supposing it to have been the one referred to, it is not pretended

that this act of March 27, 1869, embraces the town of South Ottawa, or the county of Kendall, whose bonds are the subject of the present suits. But it is urged that the reference to the act of 1857 is such a recognition of that act as to give it validity, if it had none before. This was certainly not the purpose of the act of 1869, nor do we think that such was its effect. The legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year; for that would be an evasion of the Constitution. It could at most give it vitality as a new act from the date of the act of 1869. But this it does not profess to do: it only adopts its provisions for the purposes of the act then passed. And if the legislature of 1869 could have validated all proceedings had under the supposed act of 1857, it did not do so. It did not profess to do it. No such purpose is indicated in it. The most that can be said is, that, in referring to the act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the act of 1857, as a law, can be gathered from the terms of the act of March 27, 1869. To give to such a reference in a subsequent act, as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous, and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or re-enactment of laws when it had no intention, or even suspicion, that it was doing so.

The other act relied on was passed on the twentieth day of April, 1869, and is entitled "An Act to amend an act entitled 'An Act authorizing certain cities, counties, towns, and townships to subscribe to the stock of certain railroads,' in force Feb. 18, 1857;" being the act in question, if the words "in force" are construed to refer to the date of its supposed passage. This amendatory act declares that in addition to the cities, counties, towns, and townships authorized by the said act to which this is an amendment, to subscribe to the stock of the Ottawa, Oswego, and Fox River Valley Railroad, the following portions of cities, counties, towns, and townships be authorized

to subscribe to the capital stock of said railroad in manner as provided in said act, except as hereinafter provided. The act then proceeds to designate the portions of towns referred to.

The same observations apply to this act which have been made in regard to the act of March 27, 1869. It does not profess or purport to give any new force or validity to the supposed act of 1857, or to validate any proceedings had under that act. It takes for granted — mistakenly, as we have seen — that the act was duly passed, and does nothing more.

The last-mentioned act could not, in any event, by any prospective effect, aid the holders of the bonds in suit; for the elections called to authorize their issue were held before this act was passed, as appears by the recitals in the bonds themselves. Indeed, the election authorizing the Ottawa bonds was held in 1866, — long before the passage of either of the acts referred to; and, in the absence of any expression in the laws themselves, evincing such an intention, it can hardly be claimed that these laws gave any retroactive validity to elections which were without authority, and void, when they were held.

It is to be observed that these statutes were before the Supreme Court of Illinois when deciding the case of *Miller & Paddock* v. *Goodwin*, being set up and relied on in the answer of the defendants in that case; but the court evidently did not regard them as having the effect claimed. The bonds were held to be void, and the collection of taxes to pay them was perpetually enjoined.

We do not perceive that the act of Congress, prescribing the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated so as to take effect in every other State, has any bearing whatever on the case. The authentication thus provided for was intended as evidence only of the existence of such acts and records, and not to give them any greater validity or effect than that which they had in the State from which they were thus accredited. The act expressly declares that, when thus authenticated, they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence they are taken. It merely provides a mode of proving public records, leaving them, when proved, invested

with the same force and effect (and no other) which they have at home. But when a court of the United States is held in any State, it is bound to know the laws of such State the same as the domestic courts are.

Judgments reversed, and records remanded with directions to award in each case a venire facias de novo.

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE CLIFFORD, MR. JUSTICE SWAYNE, and MR. JUSTICE STRONG, dissenting.

I am unable to agree to the judgment which has been rendered in this case. There is no doubt but that the construction which the courts of Illinois have uniformly given the Constitution of the State is binding upon us as a rule of decision. The difference between me and the majority of my brethren is as to the construction that has been given, not as to its effect when ascertained. After a careful consideration of all the cases to which our attention has been directed, I am forced to the conclusion that the question has been made by the courts of Illinois one of fact and not of law. The majority of this court think it has been made one of law. Such a construction might and probably would be more logical; but our duty is to ascertain what has been decided, not what should have been.

The case of *Spangler* v. *Jacoby*, 14 Ill. 297, is the first of a long series of cases in which this question has been considered; and, so far as I have been able to discover, little has been done since, except to reaffirm and apply what was there decided.

Looking, then, to that case, we find that *prima facie* an act enrolled, signed by the speakers of the two houses, approved by the governor, deposited in the office of the Secretary of State, and published under his superintendence among the laws certified by him, is a valid law. The language of the court is: "The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law." Afterward, in *Illinois Central Railroad Co.* v. *Wren*, 43 id. 79, it is said, "The laws certified by the Secretary of State, and published by the authority of the State, must be received as having passed the legislature in the manner required by the Constitution,

unless the contrary clearly appears." And, again, no longer ago than last year, in *Larrison* v. *Peoria, Atlanta, & Decatur Railroad Co.*, 77 id. 18, "If we find a law signed by the speakers of the two houses, and approved by the governor, we must presume that it has been passed in conformity to all the requirements of the Constitution, and is valid until the presumption is overcome by legitimate proof."

This law was enrolled; signed by the speakers of the two houses; approved by the governor; deposited in the office of the Secretary of State; published by him with the requisite certificate among the laws passed at the session of the legislature in 1857; acquiesced in by the people of the State as a valid law for more than thirteen years after its publication; accepted and acted upon by the inhabitants of South Ottawa in October, 1866, when they voted under it for a subscription to the stock of the railroad company, and authorized the issue of the bonds of the township in payment; recognized as a valid and existing law by the legislature of the State, March 27, 1869, and April 20, 1869, when laws were passed referring to it as in force, and amending it; and finally acted upon by the officers of the township, when, in obedience to the vote of the inhabitants, they subscribed to the stock of the railroad company, and issued the bonds authorized by the act in payment.

In this condition of things the courts were bound to take judicial notice of it as a law in force. This was expressly decided in *Illinois Central Railroad Co.* v. *Wren*, *supra*, where it was said, "Although we take judicial notice of all acts of the legislature signed by the governor and found in the office of the Secretary of State, and although for some purposes we may take judicial notice of the legislative journals, yet it is not our province, at the suggestion or request of counsel, to undertake to explore these journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature and into the hands of the governor. If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of the legislative journals, and introduce the proof into the record."

And again, during the same year, 1867, in *Grob* v. *Cushman*, 45 id. 124, where the question was as to the jurisdiction of the La Salle County Court, in a case which was brought before the Supreme Court for examination upon a writ of error, this language is used: —

"It is insisted that the La Salle County Court did not have jurisdiction of the subject-matter of this cause; that the act of the legislature under which the jurisdiction is claimed never became a law in the mode prescribed by the Constitution. And counsel, in their argument, refer to the journals of the house in support of this position. On the trial below, no evidence from the journals was introduced. But it is now urged, that, as they are public records, the court will take judicial notice of them, and not require them to be embodied in the evidence. It is true that they are public records, but it does not follow that they will be regarded as within the knowledge of the courts, like public laws. Like other records and public documents, they should be brought before the courts as evidence. But when offered, they prove their own authenticity. Until so produced, they cannot be regarded by the courts."

Both these cases were decided two years before the bonds now in suit were issued.

Later, in 1871, in the case of *The People* v. *De Wolfe*, 62 id. 253, an application was made for a *mandamus* requiring a justice of the peace to issue an execution upon a judgment recovered before him. In his return, he stated that the act under which he assumed jurisdiction when he gave the judgment had never in fact been constitutionally passed, and gave the particulars of his claim in that behalf. In delivering the opinion, the court clearly considered the question presented as one of fact, for they say: —

"It appears by the return, which is not traversed, and is to be taken as true, &c. . . . Our decision is predicated solely upon the state of facts as set forth in the return in this case, without an inspection of the journals of the Senate, and we pass upon the validity of the act in question no further than as affects the present application in view of the admitted facts in the case."

It is difficult to see what could be done to manifest more clearly the determination of the court to make the question

whether a *prima facie* statute had been constitutionally passed one of fact, to be established by "legitimate proof" when a contest arises. This may operate to give an apparent statute effect under one state of circumstances, and not under another; but with that we have nothing to do. Our duty is ended when we have discovered and complied with the rule which the appropriate tribunal has established.

Under the operation of this rule the plaintiff below made out his case, when he proved the execution of his bonds and put them in evidence; and, in the absence of proof by the defendant, he was entitled to his judgment, even though the law might not have been constitutionally passed: because it was no part of the duty of the court "to explore the journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature."

The question then is, whether, under the circumstances of this case, the defendant can be permitted to make the proof. This does not depend upon the construction of the Constitution, but upon the general principles of commercial law applicable to the Constitution as construed. The issue is made upon the fact of the passage of the law. *Prima facie* it was passed, and it was apparently in force. Both parties acting upon this *prima facie* case, and supposing it to be true in fact, have become bound: one has borrowed and the other lent. The lender has performed his part of the contract and delivered the money, and the simple question to be determined now is, whether, under such circumstances, the borrower can refuse to pay, because, upon further investigation, he has ascertained that the legislative journals do not contain the necessary evidence to establish the fact of the due enactment of the law. Reverse the case. Suppose the town had subscribed for the stock and paid the subscription, could the railroad company keep the money and refuse to issue the stock because, after the transaction, it had ascertained that a vote had not been taken by ayes and noes in one of the houses upon the final passage of the bill? Certainly not; and the reason is obvious. Under such circumstances, the law estops the party from asserting the falsehood of that which appears to be true. This rule has, from the beginning, been applied here to this class of cases. It was first stated in *Com-*

missioners of Knox County v. *Aspinwall*, 21 How. 545, where, using the language of Ch. B. Jervis in *Royal British Bank* v. *Tarquand*, 6 El. & Bl. 527, it was said: —

"We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, will find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

It is unnecessary to refer to the numerous cases which have come up since. While some of them have gone further than the English court did in that from which the quotation was made, none have fallen short of it. We need not go further in this. The purchasers of these bonds were bound to read the statute under which they were issued, but they were not bound to do more. Finding it upon the statute-book, apparently in force, they had the right to infer that it was actually in force, and govern themselves accordingly.

It must be remembered that this is not a case of construction. The question is not whether a law admitted to be in force confers the necessary power, but whether a law which does confer the power, and is apparently in force, can be shown not to have been in fact passed according to the requirements of the Constitution, after parties have acted upon the faith of it and changed their condition. When the question is one of construction alone, all parties stand upon an equal footing, and each can judge for himself. If a mistake occurs, it is one of law and not of fact. Here it is one of fact. The bonds on which this suit is brought are *prima facie* valid; and, as between these parties, I think the law will not admit the testimony offered to show that they are void. In the absence of proof they stand. The question is one of evidence. It is not whether the law was passed, but whether testimony can be introduced to show that it was not. I think it cannot. To admit it would ignore a principle of commercial honor upon which we have made

a long line of decisions. I am not prepared to do so. If the courts of Illinois had been willing to take judicial notice of the legislative journals in determining what the law of the State is, there might be some propriety in requiring the people to do so. But when the courts make the question of overcoming a *prima facie* law one of fact, I think the people may do the same thing, and bring to their protection the same principles of estoppel which govern them in other cases. For these reasons I dissent from the opinion which has just been read.

NOTE. — At a subsequent day of the term, counsel for the plaintiffs in error moved the court for further instructions in these cases to the court below. MR. JUSTICE BRADLEY, on behalf of the court, said: "We do not think any further directions necessary in these cases. We hold that the estoppel set up by the plaintiff below should not be allowed, but that the defendant should be permitted to show the invalidity of the act relied on by the plaintiff. We recognize the construction of the Constitution of Illinois adopted by the State court, to the effect that a law is void if not passed by the requisite majority, and so entered on the journal. We also hold the existence of a law to be a judicial question, to be decided by the court, though framed in form as an issue of fact. It follows that the court below, on retrying the case, must itself be satisfied whether the law in question was or was not constitutionally passed, and the vote entered on the journals, and instruct the jury accordingly. The evidence, or means of ascertaining this fact, must be such as is legally applicable to such a case according to the laws of Illinois. But, strictly speaking, the issue is more properly referable to the court than to a jury. That it may be so framed the judgment will be amended, directing the court below to award in each case a *venire de novo*, or to allow the parties to amend their pleadings, as they shall be advised, in order to refer the trial of the issue to the court instead of the jury."

MULLER v. DOWS.

Stipulations between counsel, relative to the course of proceeding in a cause pending in this court, cannot be withdrawn by either party without the consent of the other, except by leave of the court upon cause shown.

APPEAL from the Circuit Court of the United States for the District of Iowa.

On motion of *Mr. Thomas F. Withrow*, for the appellees, to take up and consider the appeal as submitted under the twentieth rule.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Stipulations between counsel relative to the course of proceeding in a cause pending in this court cannot be withdrawn by one party without the consent of the other, except by leave of the court upon cause shown. The counsel in this case stipulated in writing, on or before July 5, 1876, to submit the cause on printed arguments, under rule 20, during the first ninety days of this term. This stipulation was filed here July 5; but, Oct. 21, the counsel for the appellants notified the counsel for the appellees that he withdrew his agreement.

The counsel for the appellees having filed a printed argument within the ninety days, now asks that the cause be taken up and considered by the court as submitted under the rule.

This we might with propriety do, as, if the desired withdrawal is not assented to, application for the vacation of the stipulation ought to be made here in time to have it disposed of before the expiration of the ninety days. But as we have never before been called upon to settle the practice applicable to this class of cases, it is now ordered that the appellants cause a printed argument to be filed in their behalf on or before March 6, next, or show good cause why the stipulation for submission made by their counsel should not be enforced against them; and, in default, that the cause be taken up and considered as submitted under the rule, without argument by the appellants.

COMMISSIONERS OF MARION COUNTY v. CLARK.

1. A court is not required to submit evidence to the jury, unless it be of such a character as would warrant a verdict for the party producing it, and upon whom the burden of proof is imposed.
2. Where the title of the original holder of negotiable instruments, which are infected with fraud, invalidity, or illegality, is destroyed, that of every subsequent holder which rests on that foundation, and no other, falls with it.
3. Where the first indorsee, without notice of any prior equities between the original parties, purchases, for value, a negotiable instrument, the second indorsee, who acquires it before it is due, and for value, takes a good title, although he had notice of such equities.
4. Bonds issued, pursuant to legislative authority, by a municipal corporation in aid of a railroad company are negotiable instruments.
5. *Town of Colon.a* v. *Eaves* (92 U. S. 486) cited and approved.

ERROR to the Circuit Court of the United States for the District of Kansas.

Mr. A. L. Williams for the plaintiffs in error.

Mr. Alfred Ennis, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Power is vested by law in the constituted authorities of counties and other municipal corporations to subscribe for and take stock in any railway company duly organized under the law of the State or Territory, or to loan the credit of the municipality to such a railroad company, subject to the condition that the majority of the qualified voters of the same, voting at the election, shall, at a regular or a special election to be held therein, first assent to the proposal for such subscription; and the provision is that it shall be the duty of the municipal authorities, when the terms of the proposal are so approved, to make subscription to the stock of the railway company. Laws Kansas 1869, 108.

Sufficient appears to show that the railway company became duly incorporated for the purpose of constructing a railway from the northern to the southern line of the State through Davis, Marion, and other counties named in the certificate of incorporation. Tax-payers and citizens of the County of Marion petitioned the county commissioners of the county to submit a proposition to the qualified voters of the county to subscribe for two thousand shares of $100 each of the capital stock of the railway company, to be paid for in thirty-years seven-per-cent bonds of the county. Pursuant to the prayer of those petitioners, the county commissioners submitted that question to the qualified voters of the county, at a special election held at the time and place appointed in the order of the county commissioners; and it appears by the record that the election was duly held at the time and place appointed, and that a majority of the votes cast at the election were in favor of the subscription by the county for two thousand shares of the capital stock of the railway company.

By the terms and conditions of the proposition submitted and adopted, the stock to be subscribed was to be paid for in the bonds of the county, payable thirty years after their date,

with annual interest at the rate of seven per cent per annum; and the proposal was that the bonds should be delivered to the railway company as follows: 1. That, on the completion of the grading of the railway from the northern line of the county to Marion Centre, one-half of the bonds should be due and deliverable under the contract. 2. That, upon the completion of the railway from Marion Centre to the village of Peabody, other bonds to the amount of $75,000 should be due and deliverable as a second instalment. 3. That, upon the completion of the railway to the south line of the county, the residue of the stipulated amount of the bonds should be due and deliverable.

Due canvass of the qualified votes cast at the election was made by the county commissioners, and they made the proper entry in their records that the subscription of the stock was then and there made by their board for and in behalf of the county; and it appears that the board did then and there elect one of their number to make the subscription, and that the member so elected entered the same in the books of the railway company.

Beyond all doubt, the subscription was legally made; and it is not controverted that the railway company graded their line of railway from the north line of the county to Marion Centre, and that the authorities of the county executed and delivered to the railway company the bonds of the county to the amount of $100,000, in pursuance of the terms of the subscription, with coupons attached for the payment of interest at the rate of seven per cent semi-annually.

Purchases of the bonds with coupons annexed to a large amount were made by the plaintiff from the First National Bank of Junction City, where they were deposited for sale. Payment of the interest coupons being refused, the plaintiff, as the owner and holder of the same, instituted a suit in the Circuit Court to recover the amount. Two other suits were subsequently instituted by him for a similar purpose; and the three suits in the course of their prosecution were consolidated, the claim of the plaintiff being for the amount of one hundred and ninety-four coupons, each for the sum of thirty-five dollars. Service was made, and the defendants appeared and set up the several defences exhibited in the answer. Special reference to

the separate defences as set up in the answers may be omitted, as the questions to be re-examined sufficiently appear in the bill of exceptions.

Questions of fact were submitted to the jury; and the transcript shows that the verdict and judgment were for the plaintiff, in the sum of $6,703.54, and that the defendants excepted to the rulings and instructions of the court.

Two thousand shares of the stock were subscribed; but the bonds were issued in shares of $1,000, with interest coupons attached. On the trial of the cause, the plaintiff, to maintain the issue on his part, offered one of the bonds in evidence, with an overdue coupon attached; and the defendants objected to its admissibility, upon three grounds: 1. Because it was signed only by the chairman of the county commissioners. 2. Because it was made due and payable thirty years and twenty-seven days after date. 3. Because the interest coupons attached provide for the payment of interest semi-annually instead of annually. But the court overruled the objections, and the bond with the coupon attached was admitted, subject to the objections of the defendants. Coupons of a similar character, to the number of one hundred and ninety-four in all, were also introduced in evidence by the plaintiff, subject to the same objections.

Exceptions were duly taken by the defendants to the rulings of the court in admitting the bond and coupons, and the plaintiff rested his case in the opening. Evidence was then introduced by the defendants, consisting, in the first place, of the deposition of the plaintiff and a certified copy of the record of a suit previously instituted in the County Court to cancel the bonds issued by the county and to restrain the First National Bank from transferring the same to the railway company.

They also introduced a copy of the proposition submitted to the qualified voters of the county to subscribe for the capital stock of the railway company, in payment for which the bonds in question were executed and delivered, to which reference has already been made; but it also provides, that, before any county bonds should be issued and delivered, the railway company shall execute to the county a good and sufficient bond that the company will complete the railway as therein represented and proposed.

Before the bonds were issued and delivered by the county the railway company did execute a bond to the county in the sum of $200,000, conditioned that the company should fully complete and stock the railway, and put the same in running order, as required in the recorded conditions of the subscription.

Both parties agree that bonds to the amount of $100,000, and no more, were issued by the county and delivered to the company; but the defendants insist that the authorities of the county were induced to issue and deliver the same by the misrepresentation and fraud of the railway company.

Two suggestions in that regard are exhibited in the answer and in the assignment of errors: 1. That the railway company, when they applied for the bonds, concealed from the authorities of the county the fact that the company had been reincorporated with an amended charter. 2. That the company, when they applied for the bonds, falsely and fraudulently represented that the sureties were good for the amount of the bond, and the defendants introduced evidence tending to show that the sureties were insolvent.

They also gave evidence tending to show that the charter of the company was amended, and the nature and extent of the amendment made, before the company applied for the bonds, and that they gave no notice to the authorities of the county of the meeting of the directors of the company when those amendments were adopted.

Three other defences set up in the answer should be briefly noticed: 1. That the bonds were illegal, because issued for a longer time than thirty years. 2. That they were illegal, because the interest is payable semi-annually instead of annually, as stipulated in the proposition submitted to the qualified voters. 3. That the plaintiff is not a *bona fide* holder of the bonds, because he did not pay value for the same before they became due, without knowledge of the facts set up in these defences: all of which is expressly denied by the plaintiff in his reply to the answer.

Instructions were given by the court to the jury in substance and effect as follows: 1. That the plaintiff, when he introduced the coupons in evidence, made out a *prima facie* case. 2. That there is no evidence to go to the jury to show that the First

National Bank had notice, at or prior to the purchase of the bonds, of the fraudulent character of the representations made by the railway company which induced the authorities of the county to accept the bond given by the company to complete the railway, as stipulated in the proposition submitted to the qualified voters of the county. 3. That if the bank gave value for the bonds and purchased them before due, without notice of the fraud set up and relied on by the county in respect to the bond given in evidence, and sold the bonds in suit to the plaintiff, he is entitled to recover on the bonds, though he had notice when he obtained them that the county claimed they were fraudulent, and that a suit was pending contesting their validity, the record of which had been introduced in evidence. 4. That the amendment of the charter of the railway company is no defence, if the bonds in suit were purchased by the bank before due and for value.

Seasonable exceptions were taken by the defendants to the several instructions given to the jury and to the rulings of the court in admitting and excluding evidence in opposition to the objections made by the defendants, and they sued out a writ of error, and removed the cause into this court.

Provided the bond was properly admitted in evidence, it is too plain for argument that the first instruction is entirely correct, and the better opinion is, that the exception to it was only taken to exclude the conclusion that the objections previously made to the admissibility of the bond were not waived.

I. All of the bonds recite on their face that the county has caused the same "to be signed in their behalf by the chairman of the board of county commissioners, attested by the county clerk, and the seal of said county affixed." They bear date the 3d of September, 1872, but they were not issued and delivered until the 4th of November following. Instruments of the kind must be tested in that regard by the law of the jurisdiction where they are executed; and by the law of the State in force at that time it is provided that "such bonds, if issued by a county, shall be signed by the chairman of the board of county commissioners, and be attested by the county clerk," which is all that need be said in response to the first objection. Laws

Kansas 1872, sect. 2, p. 111; *Thayer* v. *Montgomery County*, 8 Dillon, 389; *Marcy* v. *Oswego*, 92 U. S. 637.

Enough has already been remarked to show that the second objection to the admissibility of the bond is without merit, as there is no excess in time beyond thirty years if the computation be made as it should be, from the time the bonds were actually executed, issued, and delivered. Laws Kansas 1872, sect. 2, p. 111.

Where a municipal corporation has power to borrow money, they may make the principal and interest payable when they please, which is a sufficient answer to the third objection. *Meyer* v. *Muscatine*, 1 Wall. 391.

Viewed in the light of these suggestions, it is clear that the bond was properly admitted in evidence, and that the exception to the first instruction given to the jury must be overruled.

II. Matters of fact are involved in the exception to the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder* v. *Wombwell*, Law Rep. 4 Exch. 39.

Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury: but the modern decisions have established a more reasonable rule; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Law Rep. 2 Priv. Council Apps. 335; *Improvement Co.* v. *Munson*, 14 Wall. 448; *Pleasants* v. *Fant*, 22 id. 120; *Parks* v. *Ross*, 11 How. 373; *Merchants' Bank* v. *State Bank*, 10 Wall. 637; *Hickman* v. *Jones*, 9 id. 201.

Apply that rule to the question before the court, and it is clear that the ruling of the Circuit Court was correct, as there is no evidence reported in the transcript which would have warranted the jury in finding the issue for the defendants.

Jewell v. *Parr*, 13 C. B. 916; *Toomey* v. *Railway*, 3 C. B. N. S. 150; *Wheelton* v. *Hardisty*, 8 El. & Bl. 276; *Schuchardt* v. *Allen*, 1 Wall. 369; *Grand Chute* v. *Winegar*, 15 id. 369.

III. Due exception was also taken to the third instruction, which presents a question of commercial law. Standard authorities show that, where a negotiable instrument is originally infected with fraud, invalidity, or illegality, the rule is, that the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation and no other falls with it. Byles on Bills, p. 118.

Where the theory that the plaintiff paid value for the instrument depends solely upon the *prima facie* presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defence, prove that the instrument originated in illegality or fraud; and the rule is, if he establishes such a defence, that a presumption arises that the subsequent holder gave no value for it, and it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by proof that the plaintiff paid value for the instrument, in which event the plaintiff is still entitled to recover. *Fitch* v. *Jones*, 5 El. & Bl. 238; *Smith* v. *Bracne*, 16 Q. B. 244; *Hall* v. *Featherstone*, 3 H. & N. 287; 2 Pars. on Bills and Notes, 438.

But the rule is different when the question is whether the indorsee and holder had notice of the prior equities between the antecedent parties to the instrument. Holders of such instruments, under such circumstances, are not obliged to show that they paid value for the instrument until the other party has clearly proved that the consideration was illegal, or that it was fraudulent in its inception, or that it has been lost or stolen before it came to the possession of the holder. *Wheeler* v. *Guild*, 20 Pick. 551; *Collins* v. *Martin*, 1 Bos. & Pul. 648; *Miller* v. *Race*, 1 Burr. 452; *Peacock* v. *Rhodes*, 2 Doug. 632.

Possession, even without explanation, is *prima facie* evidence that the holder is the proper owner or lawful possessor of the instrument; and the settled rule is, that nothing short of fraud — not even gross negligence — is sufficient to overcome the pre-

sumption and invalidate the title of the holder, as inferred from his actual custody of the instrument. *Goodman* v. *Harvey*, 4 A. & E. 780; *Goodman* v. *Simonds*, 20 How. 367; *Uther* v. *Rich*, 10 A. & E. 784; *Arbouin* v. *Anderson*, 1 A. & E. N. S. 498.

None of these propositions can be controverted; and it follows that where the first indorsee purchases the instrument before due and pays value, without notice of any prior equities, the second indorsee holding under the first takes a good title, even though he had notice of such prior equities, if he purchased the instrument in the regular course of business before it became due, for the reason that he took a new and independent title under another indorser. *Bailey* v. *Bidwell*, 18 M. & W. 15.

Notice of such prior equities cannot affect the title of the second holder, if he acquired title from a prior holder who had no such knowledge. Byles on Bills (5th Am. ed.), 118; Story on Notes, sect. 196; Story on Bills, sect. 220.

Suffice it to say, without pursuing the inquiry, the court is unhesitatingly of the opinion that the exception to the third instruction must also be overruled.

IV. Proof was offered by the defendants to show that the charter of the railway company was amended subsequent to the subscription to the stock, so as to include branches four hundred and fifty miles in length, in addition to the original line, without the knowledge or consent of the county commissioners or of the directors of the railway company resident in the county: but the plaintiff objected to the evidence, and it was excluded by the court; to which ruling the defendants then and there excepted, which presents the same question as that which arises from the exception taken to the fourth instruction given to the jury, as follows: that the amendment of the charter is no defence to the action if the bonds were purchased by the bank before due and for value.

Counties, if duly organized under the law of the State, are certainly vested with the power to subscribe for stock in a railway company, and to issue the bonds of the county to pay for such subscription. Suppose that is so, still it is insisted by the defendants that the bonds delivered to the railway company

in this case impose no pecuniary obligation upon the county, in consequence of the defects and irregularities in the proceedings of the municipal authorities, and the frauds and misrepresentations of the officers and agents of the railway company.

In conducting the defence at the trial, the defendant proceeded upon the ground that the plaintiff had knowledge of the supposed defects, irregularities, frauds, and misrepresentations; but the finding of the jury under the instructions of the court negatives every such imputation, and shows that the plaintiff is a *bona fide* holder of the instruments, having purchased the same in the usual course of business before due and for value. That such is the legal effect of the verdict cannot be doubted; and it appears by the recital of the bonds that they were issued in payment for two thousand shares of the capital stock of the railway company subscribed by the county, in pursuance of an order of the county commissioners, made and entered in their minutes.

Bonds of the kind executed by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, and, if purchased for value in the usual course of business before they are due, give the holder a good title, free of prior equities between antecedent parties, to the same extent as in case of bills of exchange and promissory notes. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity to the prescribed regulations and pursuant to the required conditions and qualifications, proof that any or all of the recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications which it is alleged were not fulfilled. *St. Joseph Township* v. *Rogers*, 16 Wall. 659; *Town of Coloma* v. *Eaves*, 92 U. S. 484.

Other cases, too numerous for citation, have been decided by this court to the same effect, but suffice it to say that we are all of the opinion that there is no error in the record.

Judgment affirmed.

FULLER v. YENTZER.

1. The alleged new and useful improvement in mechanism for marking cloth in sewing-machines, for which letters-patent No. 28,633, bearing date June 5, 1860, were issued to Henry W. Fuller and Anthony W. Goodell, consists only of a combination of old elements or ingredients constituting an apparatus for effecting the results described in the specification.
2. The rights of the holder of such a patent are not infringed, unless it appears that, without his authority, the entire combination is made, used, or sold.
3. The apparatus used by the respondents, and that for which said letters-patent were awarded, described, and the conclusion reached, that they essentially differ in their construction and mode of operation.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Mr. E. B. Barnum and *Mr. E. N. Dickerson* for the appellants.

Mr. Walter B. Scates, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the Patent Act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation, independent of the mechanical devices employed; nor will a patent be held valid for a principle or for an idea, or any other mere abstraction. *Burr* v. *Duryee*, 1 Wall. 531.

Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations given in the description; and, if the claim contains words referring back to the specification, it cannot properly be construed in any other way. *Seymour* v. *Osborne*, 11 id. 516.

Improvements in mechanism for marking cloth in a sewing-machine, it is alleged in the bill of complaint, were invented

and patented by the complainant, and he charges that the respondents have infringed the exclusive privilege secured to him by the letters-patent, and he prays that they may be decreed to account for the gains and profits which they have made by the infringement, and for an injunction. Process was served; and the respondents appeared and filed an answer, setting up several defences, two of which it will be important to examine in disposing of the case: 1. That the complainants are not the original and first inventors of the patented improvement. 2. That the respondents have never infringed the complainants' patent, as alleged in the bill of complaint.

Before describing the nature of his invention, the patentee refers to figure 1 of the drawings, as showing the main features of the patented improvement when arranged in a sewing-machine for the purpose of accomplishing the results described in the specification, and he proceeds to state that the invention consists in a vibrating marking instrument which moves in unison with the needle of the sewing-machine, so as to crease the cloth at given distances from the needle, the marking instrument not pressing on the cloth except while the needle is in the cloth, which prevents the cloth from being obstructed in the movement by the feed, and allows the marking to be made at any distance from the sewing without wrinkling the even surface of the cloth.

By the use of a point vibrating in unison with the needle, and acting on the upper surface of the cloth in connection with a notch or an elastic surface or pad below the cloth, a crease will be made whose ridge is below the cloth; and by the use of one, two, or more of these up or down markers, or one up and one down marker, the crease or ridge can be made exactly at the required distance from the line of sewing, and either upward or downward, according to the way in which the cloth is to be folded for the subsequent operations.

Where more than one line of sewing is required, the crease or creases for the next fold are made in the same way; and the patentee states that the device is especially useful in all kinds of tucking, and in plaiting shirt-bosoms and other similar work, and he represents that, by the use of a vibrating pencil or chalk, a line of marks may be made by which a second line of stitch-

ing may be guided, which will become useful in quilting, or in performing any straight, curved, or parallel lines of stitching. Superadded to that, he also represents that if the marking-points are at right angles to the feed, from the needle, the marking will be at a given distance from the sewing and parallel thereto, regardless of the curved or zigzag form in which the sewing is performed.

Sufficient appears in the preceding description of the invention and of the principal devices of which it is composed, including the arrangement of the same and their mode of operation, to render it unnecessary to reproduce the minute references in the specifications to the representations exhibited in the different figures of the drawings.

Throughout the description it is apparent that the patented apparatus is to be attached to an organized sewing-machine; and the patentee states that the manner of effecting the attachment must be varied as circumstances may require, in view of the structure of the particular sewing-machine and the kind of work to be performed, and he adds that the vibrating motion may be given to the marker by the needle-bar or any other suitable device. Gauges, it seems, are employed for spacing off the width of the folds, tucks, or plaits; but the patentee states that he does not claim those devices, though he is of the opinion that the devices which he employs work better than any he has before known.

1. What he claims is the forming one, two, or more creases in cloth by means of markers on opposite sides of the cloth, one of which is connected with the bed of the machine, and the other operates simultaneously with the vibrations of the needle in a sewing-machine, whereby the crease or creases are formed in the cloth itself, parallel to the line of sewing, in such a manner that the cloth is ready for doubling over at the creases for the next line of sewing.

2. He also claims marking a line on the surface of cloth or other material sewed in a sewing-machine, by means of a pencil or similar article pressed upon the surface of the cloth at the time the needle perforates the same, and is raised therefrom when the feed takes place, so as to produce a series of marks parallel to and simultaneous with the line of sewing.

Concede that a result is not patentable, which is clearly shown to be true by the preceding remarks, and two things follow as a necessary consequence: 1. That the invention described in the first claim is merely the described apparatus for forming one, two, or more creases in cloth by means of markers on opposite sides of the cloth, for the purpose and in the manner and by the means therein described, it being clearly understood that the patentee does not claim the described means of attaching the patented apparatus to a sewing-machine. 2. That the invention described in the second claim is merely the described apparatus for marking a line on the surface of cloth or other material sewed on a sewing-machine, by means of a pencil or similar article pressed upon the surface of the cloth at the time the needle perforates the same, for the purpose and in the manner and the means described, excluding the means by which the patented apparatus is attached to a sewing-machine.

Special reference is made to the principal features of a sewing-machine; but inasmuch as the apparatus may be attached to any such machine, it is not deemed necessary to enter into those details, especially as the patentee states to the effect that the sewing is to be performed by the needle of the machine to which the apparatus is attached, in connection with a shuttle, looper, or other similar device.

Particular mention is made of the operative devices of the patented apparatus for marking lines parallel to the line of sewing and for forming the creases in the cloth, as shown in the drawings. Briefly stated, those devices are as follows: 1. An arm extending from the needle-arm or bar, and vibrating with the same. 2. A pencil, chalk, or point adjusted on the arm of the apparatus so that in its vibrations the point shall press upon the cloth and make a mark thereon for the second line of stitches at the required distance from the line of sewing and parallel to the same. 3. Both the specification and the drawings also show a bar which, as the patentee states, may be attached to the presser-foot, so as to be raised up with it, or that it may be sustained in any other convenient manner. 4. Adjustable marking-arms are also shown, which extend from the bar of the apparatus, and which are provided, one with a marking-point, and the other with a marking-notch. Arms formed

as springs are also provided, so that the marking-point and the marking-notch are raised from the cloth, except when acted on by the arm of the apparatus. Springs are also used in connection with the adjustable marking-arms, so as to yield in case of inequality in the thickness of cloth and not to interfere with the full stroke of the needle-bar.

Enough appears to show that the apparatus is attached to the bed of a sewing-machine, to which a plate is screwed which carries another adjustable marking-point, formed somewhat similar to the marking-point previously described, and the device or its equivalent employed to regulate the distance of the second line from the one being sewed.

Two marking-points are particularly described; and the representation is that they are both made thin, round, blunt, and chisel-formed, so as not to injure or catch on the cloth, and that the one shown in the third figure of the drawings may be fitted to slide in a groove to render the same adjustable at the desired distance from the needle, or that several such points may be formed or attached permanently at short distances apart.

Speaking of the device to regulate the distance for the second line of sewing, the patentee states that it may be adjustable, and that it will form a crease for the marking-point, and that it may be set in a small metal holder, or it may be constructed of sufficient length to comprise the whole distance to which the marking-point may be adjusted.

Three marking-points and the notch are mentioned in the specification; and the statement is that the one first mentioned and the device employed to regulate the distance for the second line produce a downward crease, and that the notch and the other marking-point shown in the third figure of the drawings produce an upward crease when the cloth is exposed to the action of these parts by passing between the same.

In order to give motion to these markers, the bar or arm of the apparatus strikes on the spring part of the adjustable marking-arms, which extend from the bar attached to the presser-foot, pressing the surfaces together, and cramping or creasing the cloth.

For tucking, the markers should extend on the other side of the needle-arm, and for that purpose the bar attached to the

presser-foot of the sewing-machine may be fitted in any convenient manner; but where a holder or arm to the presser-foot is used in the manner shown, the hole into which the bar sets may pass through the same and be provided with a clamping-screw, so that the bar attached to the presser-foot can be inserted from the other side, and in that case the plate also should stand on the other side of the needle, a second slot being provided for the purpose. Change to the other side must also be made in the arm of the apparatus, extending from the needle-arm of the sewing-machine to the marking-point first described and the device to regulate the distance for the second line of stitching.

Corresponding variations must be made in the manner of attaching the apparatus to the sewing-machine, and the patentee states that the vibrating motion may be given to the markers by the needle-bar, or by any other suitable device.

Proofs were taken, the parties heard, and the Circuit Court entered a decree dismissing the bill of complaint, and the complainants appealed to this court.

Want of novelty in the supposed invention, and the denial of infringement by the respondents, constitute the two defences set up in the answer; but the evidence to overcome the *prima facie* presumption that the patentee is the original and first inventor being insufficient for the purpose, the first defence must be overruled. *Cammeyer* v. *Newton*, *supra*, p. 225.

Grant that, and it follows that the decision in the case before the court must depend upon the question of infringement. Without more, the remarks already made are sufficient to show that the patented improvement is a combination of old elements constituting an apparatus for effecting the results described in the specification.

Intentional infringement is alleged by the complainants, and the burden is upon them to prove the allegation, as the charge imputes a wrongful act to the respondents.

Where the invention is embodied in a machine, the question of infringement is best determined by a comparison of the machine or apparatus constructed or used by the respondent with the mechanism described in the specification of complainant's patent. Comparison of the kind has been carefully made by the court in the case under consideration, aided by the

expert evidence exhibited in the record; and the court is of the opinion that the invention of the complainant, when the patent is properly construed, is not embodied in the apparatus constructed, sold, or used by the respondents, as charged in the bill of complaint.

Two distinct devices are shown in the complainants' patent which operate upon the cloth when being sewed in a sewing-machine, so as by the one to leave a mark, and by the other to make a crease in the cloth to indicate where it should be folded for the future operation. Briefly described, one of the devices consists of a pencil arranged as before explained, and the other consists of the notch and the point fitting into it, called the markers, and placed on opposite sides of the cloth, and which are operated by the needle-arm, and so arranged in their connections as to vibrate in unison with the needle to press the cloth in the notch while the needle is in the cloth, thereby forming a crease in the same parallel to the line of sewing, for the purpose of indicating the place for the next fold.

Creases of the kind are made by the point and notch, but the pencil is employed to make a mark on the cloth when the cloth is moved under it, as a guide for folding the cloth, as before sufficiently explained. No such device as the pencil or its equivalent is found in the respondents' apparatus, nor any thing which will perform the same function, or which has or can be made to have the same mode of operation. Nothing of the kind is exhibited in their apparatus, nor is any thing of the kind described in the patent under which they profess to work, nor are there any means or mechanism exhibited or described whereby such a device can be employed in the apparatus or be made to operate to mark the cloth in any manner so that the same could be evenly folded.

In the complainants' apparatus the pencil is fastened to a bar which projects out from the needle-arm in nearly a horizontal direction, entirely unlike any thing shown in the respondents' apparatus. Projecting outward from the presser-foot, and fastened to it, is a substantial frame-piece, called a bridge by one of the witnesses, which supports a bar running parallel with the bed of the machine and nearly parallel with the needle-arm, which supports one or more spring-arms, the same being pro-

vided with two slides or markers, — one being a point operating in an elastic bed fastened to the plate of the marker, and the other being a point or sharp device fastened to the bed-plate and operating on an elastic bed attached to one of the described spring-arms. Attached to the needle-bar is the arm which supports the pencil, and in the downward movement of the bar it comes in contact with the spring-arms and causes the described points to mark the cloth.

Viewed in the light of these suggestions, it is clear that the distinct features of the invention consist in the elevated bar projecting out of the frame attached to the presser-foot, the described spring-arm, the bar projecting out from the needle-arm with the described points, and the bed-plate on which they strike.

Turn from that to the patent of the respondents, or to the apparatus which they make, use, and sell, and it appears beyond all doubt that the apparatus of the respondents is substantially different in many respects from the patented improvement of the complainants. There is no framework in the respondents' apparatus, projecting out from the presser-foot, nor any horizontal bar projecting out from the framework, nor are there any spring-arms attached to any horizontal bar, nor is there any horizontal bar projecting out from the needle-arm to operate any such spring-arms as those described in the complainants' specification.

Instead of that there is, in the apparatus of the respondents, a pivoted double-spring blade operating on both sides of an upwardly projecting point. Effective means for operating that blade are also shown, and it appears that they consist in a spring-arm attached to the bed-plate of the marker which extends over the double blade, and that a vertical slot is made in the spring-arm through which the needle passes, and allows the lower end of the needle-arm to force the spring down on to the double blade while the cloth passes under the blade and over the sharp point, by which the elasticity of that portion of the cloth is lessened so that it will readily bend to form a tuck at the marked place.

Other differences are also apparent; as, for example, the spring-arm in the apparatus of the respondents is not attached

to the double blade or marker, nor is the double blade attached to any horizontal bar projecting out from the presser-foot, as in the apparatus of the complainants.

Without more, the differences suggested are sufficient to warrant the conclusion that the construction and mode of operation employed by the respondents is substantially different from the means and mode of operation described in the specification of the complainants' patent.

Expert witnesses testify that the bar projecting out from the frame attached to the presser-foot, the spring marker-arm, and the bed-plate are all necessary in the apparatus of the complainants to perform the function described in the specification, and the court, without hesitation, concurs in that conclusion; and the witnesses also state that if any one of those devices be omitted the apparatus will be wholly inoperative, except that perhaps one marker instead of two might answer the purpose to some extent, as set forth in the specification.

Beyond doubt, all those devices must co-operate to effect the described result; and it is equally clear that neither those devices nor any of them can be substituted by any device in the respondents' patent or apparatus without reconstruction and invention, nor would any thing short of invention enable the constructor to successfully use the devices shown in either apparatus in the other, so as to render the apparatus operative to effect the result described in the complainants' patent. None of the elements of the patented apparatus are new, and it follows that the patent consists in the described apparatus or in the combination of the old elements of which the apparatus is composed.

Valid letters-patent undoubtedly may be granted for an invention which consists entirely in a new combination of old elements or ingredients, provided it appears that the new combination of the ingredients produces a new and useful result; but the rule is equally well settled that the invention in such a case consists merely in the new combination, and that a suit for infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same elements or ingredients, if the combination is in fact new and useful, and substantially

different from the one which preceded it. *Gill* v. *Wells*, 22 Wall. 14.

Such an invention, if it produces a new and useful result, is the proper subject of a patent, and such a patent is valid and operative; but the right of the patentee under it differs in one respect from those of a patentee for an invention which consists of an entire machine, or of a new and useful device, as the rights of a patentee for a mere combination of old ingredients are not infringed, unless it appears that the alleged infringer made, used, or sold the entire combination. *Gould* v. *Rees*, 15 Wall. 194; *Prouty* v. *Ruggles*, 15 Pet. 341; *Vance* v. *Campbell*, 1 Black, 428.

Beyond doubt, that rule is correct; but the mere substitution of another old ingredient for one of the ingredients of a patented invention is not a good defence for an infringer, if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise if the ingredient substituted was a new one, or performed a substantially different function, or was not known at the date of the patent in question as a proper substitute for the one omitted, as in that event the defendant does not infringe. *Roberts* v. *Harnden*, 2 Cliff. 504.

Substantial differences between the apparatus of the respondents and the patented improvement of the complainants other than those referred to may also be pointed out, which of themselves are quite sufficient to show that the charge of infringement is not established.

By the patent of the respondents it appears that their apparatus contains an additional device, consisting of a slide-guide, the function of which appears to be to regulate the width of the tuck, the scales being marked on the bed-plate to be used as a guide for that purpose. Plainly no such device is shown in the apparatus of the complainants. Instead of that, they adjust the spring-arms which are on the bar projecting out from the framework or bridge attached to the presser-foot.

When the slide-guide in the respondents' apparatus is moved, the needle-arm still continues to strike the spring-lever or spring-arm on the same place; but when the spring-arms in

the complainants' apparatus are moved on the bar projecting out from the frame attached to the presser-foot of the sewing-machine, the bar projecting out from the needle-arm necessarily strikes the spring-arm at another point on the bar, showing that the two devices operate on distinct principles, as they are controlled and regulated by different mechanical means.

Wide differences also exist in the operation of the marking-points, when one apparatus is compared with the other. Suitable means for adjusting the marking-point are shown in the complainants' patent, but the marking-point in the respondents' apparatus is stationary. In the complainants' apparatus it is adjustable in a slot made in the bed-plate, so that it may be moved longitudinally to correspond with the notches or bearings in the end of the spring-arms when the latter are adjusted, it appearing that one marking-point in that apparatus projects up from the bed-plate, and that the other marking-point extends down from one of the spring-arms; that the point in the bed-plate operates in a bearing or notch in one of the spring-arms, and that the other spring-arm has a point operating in a bed in the slot made in the bed-plate, which shows that either spring-arm, with its respective marker, may perform the same functions substantially as the other spring-arm.

From these remarks, it follows that the point or bar for marking, in the complainants' apparatus, must necessarily be adjusted in the bed-plate to a distance corresponding to the movement of the spring-arms. Unlike that, the marking-point in the respondents' apparatus is stationary, and in that particular is entirely different, as all must admit who have given the matter any examination whatever.

Besides, there is in the patented apparatus a curved or movable plate attached to a horizontal arm or frame-piece fastened to the presser-foot, the function of which plate is the holding of the cloth smooth on the bed-plate as it passes through the apparatus. One end of the movable plate is elevated above the bed of the machine, while the other end is curved, and brought nearly or quite to the bed-plate of the marker, and operates independently of the other mechanism. Compare those means for holding the cloth with the means

employed in the apparatus of the respondents, and the difference is at once seen to be material and obvious; as, for example, the bar which holds the cloth to the bed-plate in the latter apparatus is attached to one end of the bed-plate, and extends lengthwise of it, and is rigidly fastened to the marking-blade, forming a different combination from that exhibited in the other apparatus, inasmuch as the bar which holds the cloth to the bed-plate is made to bear harder thereon when the spring-arm is brought down on the blade than when the needle-arm is ascending. Detach the bar from the bed-plate in the respondents' apparatus and no marking can be done, but the marker will continue to perform its function in the complainants' apparatus, even though the smooth plate were detached from the device fastened to the presser-foot.

Differences of equal importance might be continued at much greater length, but the court is of opinion that those already pointed out are amply sufficient to show that the decision of the Circuit Court dismissing the bill of complaint is correct, and there is no error in the record.

Decree affirmed.

MR. CHIEF JUSTICE WAITE, MR. JUSTICE MILLER, MR. JUSTICE STRONG, and MR. JUSTICE BRADLEY dissented.

FULLER *v.* YENTZER.

SAME *v.* GOODRICH.

1. Reissued letters-patent No. 3,218, granted Dec. 1, 1868, to Henry W. Fuller, assignee, by mesne assignments, of Israel M. Rose, for an improvement in a tuck-creasing attachment in sewing-machines, were not superseded by letters-patent No. 28,633, issued June 5, 1860, to Henry W. Fuller and Anthony W. Goodell.
2. The court holds that the apparatus constructed, used, and sold by the respondents do not infringe the complainants' patent.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

Mr. E. B. Barnum and *Mr. E. N. Dickerson* for the appellants.

Mr. Walter B. Scates, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Modifications or alterations in an invention consisting in a combination of old ingredients, which merely substitutes another old ingredient for one of the ingredients in the patented combination, is an infringement of the patent, if the substitute performs the same function and was well known at the date of the patent as a proper substitute for the one omitted from the patented invention; but the rule is otherwise if the ingredient substituted is a new one, or performs a substantially different function, or was not known at the date of the patent as a proper substitute for the one omitted from the patented combination.

Both of these suits were instituted by Henry W. Fuller, who became, by certain mesne conveyances, the owner of the invention by assignment in due form. Since then, Isaac W. Barnum, having become the owner of the patent, was, on motion of the respondents, made a party complainant in each of the two suits.

Sufficient appears to show that Israel M. Rose was the supposed inventor of the improvement; that the original patent was granted to James Wilcox, assignee of the inventor; that the first-named complainant, having subsequently become the owner of the patent, surrendered the same; and that the reissued patent, bearing date Dec. 1, 1868, on which the present suits are founded, was granted to the rightful owner of the invention at the date of the reissued patent.

Remarks respecting the title of the complainants are unnecessary, as it is not questioned by the respondents, nor is it necessary to enter into any comparison of the reissued patent with the original, as the means for such comparison are not exhibited in the record.

Briefly stated, the allegation is that the patented invention consists of a new and useful improvement in mechanism for marking cloth in a sewing-machine, or for a new method of marking a crease in cloth by what is known as the pinching process, and for other improvements in the mechanism of a

tuck-creaser, independent of the creasing devices, and that the respondents, since the first day of May, 1872, have infringed the same, as more fully set forth in the bill of complaint.

Process was served; and the respondents appeared and filed an answer, setting up the following defences, which it is important to notice: 1. That the supposed improvement was not patentable, because it had been in public use more than two years before the inventor applied for a patent. 2. That it was not patentable, because it was well known and had been in common use long before the alleged invention. 3. They deny the charge of infringement, and justify all their acts under a patent granted to Enoch S. Yentzer, dated May 28, 1872, for an improvement in tuck-markers for sewing-machines.

Proofs were taken, the parties heard, and the Circuit Court entered a decree in each case, dismissing the bill of complaint. Immediate appeal was taken by the complainants in each case to this court, and the questions here are the same as those considered and decided in the Circuit Court.

Previous to that invention the statement of the inventor is that fabrics were marked or creased by a protuberance or point and a notch or indentation caused to impinge upon opposite sides of the fabric, and the patentee states that that mode of marking or creasing the fabric is open to the objection that fine goods will sometimes be cut by the marking operation, while in heavy or flimsy goods the crease is often insufficiently defined.

Instead of the point and notch, the present invention forms marks, ridges, or creases in the fabric by a succession of nips or pinches of the same while it has motion imparted to it, in line with the crease. Motion is usually given to the fabric by the feed-mechanism of a sewing-machine, in which it is intended it shall be used as an attachment; but the motion may be imparted to the fabric in any other manner.

Objections, it is said, exist to other modes of forming creases for the described purpose, and that the process of nipping or pinching is designed to obviate those objections to other tuck-markers, and to produce a more efficient instrument. Devices called jaws are provided for the purpose, which are caused to descend while open, with more or less force or pressure, on the fabric, and then in being closed are capable of seizing a portion

of the fabric and compressing the same tightly, the fabric at the same time being properly supported against the descending force of the jaws, and which operation, being repeated while the fabric is moved along, produces the required ridge or crease, in the line of which the fabric will naturally fold, to facilitate the forming of the tuck for future operations.

Said invention also comprises certain details of construction, arrangement, and combination to adapt tuck-markers for use in connection with sewing-machines, forming a tuck-creasing mechanism having an upper and under part adjustable as to its relation with the needle of a sewing-machine, and to be operated by the sewing-machine. Reference is made to the drawings for the different views of the apparatus when properly arranged in a sewing-machine in operation, to effect the described result. Detailed description is also given of the various elements or ingredients of the apparatus and of their mode of operation.

Mention is first made of the base-plate, which has an upright standard firmly secured thereto, so as to form a permanent part of the apparatus. To the upper end of the standard a lever is jointed which carries a spring-branch, buckled at its lower end with the blade that forms one of the jaws for seizing and crimping the fabric. Freedom of motion to and from the fabric is insured by the lever, jointed as before explained, the suggestion being that the stiffness of the leather prevents any lateral motion of the creasing device; and the statement is that the lever is also designed to receive the force of the arm or other moving part of the sewing-machine, and that it transmits the motion directly to the jaws through the spring-branch, which is carried by the lever jointed to the upper end of the standard.

Besides the base-plate there is a plate called the bed-plate, with a small upright projection, to which is permanently fixed a spring-blade having its front end bent downward, and which forms a mate to the jaw already described. These jaws are hinged together, as shown in the drawings, their lower ends being sharp or serrated, in order more readily to seize the fabric.

Effectual means are provided to cause the marking device to react after each creasing action, and follow the upward motion of the needle-arm, in order to give room for the free insertion

and removal of the work; and this spring-branch shown in the drawings is made to hold the outer jaw away from the inner one when in the normal position there exhibited.

Creases are to be made in the fabric, and the design is that the creasing action shall take place as nearly as possible in front of the needle, and in line with the arm of the sewing-machine; and, to secure that, an extension-plate is provided extending out laterally from the base-plate in line with the movement of the feeding device, which supports the material under the jaws, and receives their impinging action in the operation of making the crease. By that arrangement the creasing devices are brought across the presser-foot in the proper location with respect to the needle for performing the creasing operation.

Upper and under devices are employed, on opposite sides of the cloth, to effect the patented result, and a particular description is given of the means and mode of operation of the same, by which the jaws seize the fabric, and double up and compress the same so as to produce the described creases by the apparatus when attached to a sewing-machine. When properly attached, the several parts of the apparatus are so arranged that the lever is immediately under the arm of the sewing-machine, and the arm, when the machine is operated, will strike the lever and actuate the creaser or tucker.

Tucking may also be done by the apparatus when attached to a sewing-machine; but, in order to accomplish that, a fold must first be made, by hand, in the fabric, the gauge being fastened by a set-screw to make the seam the proper distance from the edge of the required tuck. Fit means are also shown in the drawings for adjusting the apparatus in such relation to the needle that the distance from the needle to the jaws will be at least double the distance between the needle and the gauge.

Suffice it to say that one movement or alteration of either part will adjust the whole tucker with respect to the needle, as the upper part is permanently connected with the under part, and when adjusted as required the fabric is placed in the machine with the folded edge against the gauge, and the machine being started, the lever carries down the spring-branch and with it the jaws to the surface of the fabric, which operate as before explained. On the upward motion of the arm the jaws

rise and open by the elasticity of the springs, the fabric being advanced by the feeding mechanism of the sewing-machine. Movements of the kind are continued and the pinching process repeated until the cloth is fed through the machine, causing a well-defined ridge to be formed in the fabric by the creaser at the same time that a seam is sewed in the folded part of the same, forming a tuck.

Eight claims are appended to the specification, and the charge is that the respondents have infringed the first, second, fifth, sixth, and eighth, five in all, substantially as follows: 1. The mechanism as described for forming a ridge or ridges on fabrics to be afterwards folded in the line of such ridge. 2. The method of nipping or pinching the fabric to form ridges or creases thereon by means of jaws opened and closed at intervals to seize and pinch the fabric when at rest, and then release it as the same is moved along intermittently by a suitable feeding mechanism. 3. The combination of the creasing device or devices of a tuck-marker with a jointed lever, for the purposes set forth. 4. A tuck-creasing mechanism, such as described, having its upper and lower parts connected, and together adjustable, as to its relations with the needle of a sewing-machine, and operated by the sewing-machine, as set forth. 5. The combination with a tuck-marker having upper and under parts connected, and together adjustable as specified, of the lever and spring, for the purposes set forth.

Argument to show that a result is not patentable is not necessary, as that proposition is decided in the opinion in the preceding case, as well as in many other cases to which reference might be made. Apply that rule to the several claims of the patent in this case, which it is alleged the respondents have infringed, and it is clear that they are all for the apparatus, or certain portions of the apparatus, described in the specification of the patent set forth in the bill of complaint.

Whether tested by the descriptive portion of the specification or by the specific claims appended to the same, it is clear that the invention consists of a described apparatus intended to be attached to a sewing-machine for the purpose of making a mark, ridge, or crease in cloth by a succession of "nips or pinches thereof" while it has motion imparted to it by the

feeding device of the sewing-machine, as already sufficiently explained, the work of sewing being performed during the same operation of the feeding device.

Detailed description is given of the elements of the apparatus, from which it plainly appears that the invention does not include any described means of attaching the apparatus to the sewing-machine. Particular means of the kind are neither described nor claimed, nor are they shown in the drawings in a way to justify the conclusion that the means of attaching the apparatus to the motive power are any part of the invention. Instead of that, the patentee states that motion may be imparted to the apparatus in any convenient manner; nor is there any thing in any one of the eight claims of the reissued patent which would afford any support to a different theory.

Fuller's patent for his own invention preceded that of Rose by several years; but it is evident from a comparison of the two that they are substantially different in many respects, so that the latter may be considered as valid to the same extent that it would have been if the first invention had never been made.

Improvements in an apparatus of the kind may be valid if new, and if they accomplish a new and useful result, even though all the elements of the same are old, provided the combination or arrangement of the elements is new and of such a character that it involved invention to construct the combination or arrangement. When a subsequent apparatus is substantially the same as one which precedes it, the former is not the proper subject of a patent; but if it be substantially different in construction and mode of operation, then it is as much the proper subject of a patent as if nothing of the kind had ever before been invented.

Tested by these rules, it is clear that the Rose patent is not superseded by the Fuller patent, which preceded it in point of time.

Two of the defences set up by the respondents, to wit, the first and second, must also be overruled, for the reason that they are not sustained by the proofs exhibited in the record.

They also deny infringement, and the decision in the case must turn upon that issue. Infringement is charged by the

complainants, and the burden of proof is upon them to sustain the charge. Beyond doubt, it is established in these cases that all the elements or ingredients of the patented apparatus are old, and that the invention consists in the combination or arrangement of the several devices of which the apparatus is composed.

Differences exist in the answers filed in the two cases; but the respondents in both aver and allege that all the tuck-markers or creasers constructed, used, or sold by them were constructed under the patents to Enoch S. Yentzer, and in conformity therewith, and that they have in no respect in fringed or violated the rights of the complainants. Coming to that proposition, it is plain that it involves two questions: 1. Whether the respondents have constructed, used, or sold apparatuses not constructed in conformity with the patent under which they seek to justify all their acts. 2. Whether the apparatuses which they have constructed, used, or sold infringe the patent described in the bill of complaint.

Some difficulty attends the solution of the first question, because all the evidence applicable to the three cases was taken together, to save expense. It consists of depositions, admissions, documents, models, and other exhibits; but, in view of the whole, the court is of the opinion that the apparatuses constructed and sold by the respondents were constructed in conformity with the patents under which they profess to act.

Support to that view is also derived from the opinion of the circuit judge exhibited in the record, in which he admits that the complainants would be entitled to a decree if their construction of the Rose patent was correct. Damages are claimed in that case for an alleged infringement of the sixth claim of the patent, which is for tuck-creasing mechanism such as described, having its upper and lower parts connected, and together adjustable as to its relation with the needle of a sewing-machine, and operated by the sewing-machine, as set forth.

Nothing can be plainer than the proposition that the claim there made is for the previously described apparatus, when arranged in a sewing-machine, as the motive power for operating the patented apparatus. Judging from the opinion of the cir-

cuit judge, it would seem that the complainants did not claim that the respondents had constructed improvements not within their patent, but that they, the complainants, could claim under their patent every form of mechanism by which a creaser is attached or adjusted to a sewing-machine, by which unity of adjustment is accomplished, which is plainly an erroneous construction of their patent.

Viewed in the light of all the proofs, the court is of the opinion that the apparatuses constructed and sold by the respondents were constructed in conformity to the patents under which they justify in their answer.

Five of the claims of the patent, to wit, the first, second, fifth, sixth, and eighth, are involved in the charge of infringement in the third suit, which is the second suit under consideration in this case. Enough has already been remarked to show what the opinion of the court is in respect to the construction of the patent, and that the decision of the case depends upon the question of infringement. What has already been remarked is sufficient to explain the views of the court as to the nature and character of the apparatus of the complainants, and its mode of operation, and it will be sufficient to refer to the opinion just delivered for a full exposition of the views of the court as to the nature, character, and mode of operation of the patent under which the respondents justify in their answer. Better means of comparison and decision need not be required than is found in the respective specifications of these patents. Careful comparison of the two instruments has been accordingly made, and the court is unhesitatingly of the opinion that the charge of infringement is not proved, and that there is no error in the record. *Decrees affirmed.*

MR. CHIEF JUSTICE WAITE, MR. JUSTICE MILLER, MR. JUSTICE STRONG, and MR. JUSTICE BRADLEY, dissented.

MACKALL v. CHESAPEAKE AND OHIO CANAL COMPANY.

1. The canal and other works of the Chesapeake and Ohio Canal Company, situate in the District of Columbia, having, by an act of Congress of March 3, 1825 (4 Stat. 101), been exempted from taxation, a sale in 1864 of any part thereof, on account of taxes alleged to be due thereon, was void.
2. The question of the company's forfeiture of their right to hold, free from taxation, property after they ceased to use it for canal purposes, can be judicially determined only in a direct proceeding by the public authorities. It cannot be made an issue for the first time in the trial of a question of private right between other parties.

ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment for a part of Square No. 3, in the city of Washington. The Chesapeake and Ohio Canal Company, plaintiff below, proved a complete paper title to the land, and a continuous occupation of it for thirty years prior to 1867. The defendant entered that year.

Proof was made of an act of the legislature of Virginia, approved Jan. 27, 1824, entitled "An Act incorporating the Chesapeake and Ohio Canal Company," the ninth section of which provides, "That for and in consideration of the expenses, the said stockholders will be at . . . the said canal and all other works aforesaid, &c., shall be vested, &c., and be for ever exempt from the payment of any tax, imposition, or assessment whatsoever;" and also of an act of Congress approved March 3, 1825 (4 Stat. 101).

It appeared from the proof that the land in dispute had not been used for canal purposes since the year 1830, but had been leased or rented to various parties. The defendant below thereupon offered to show that it had been regularly listed and entered for taxation, and sold in 1864 for the non-payment of taxes assessed against it; and that he was in possession, claiming under a deed from the authorities of the District pursuant to such sale. The court excluded the evidence.

The jury found a verdict for the plaintiff, and a judgment was rendered thereon. The defendant then sued out this writ, and assigns for error the action of the court below in excluding the evidence offered by him.

Mr. C. Ingle, and *Mr. S. Shellabarger*, for the plaintiff in error.

Statutes conferring powers upon companies, or exempting property from taxation, are to be construed strictly as in derogation of common right.

The act of Virginia did not enlarge the capacity of the company to take and hold real property beyond what was reasonably necessary for the canal purposes specified. The large tract in controversy was not required for the uses contemplated by the charter, nor was it so applied. When listed for taxation, and for a long time previous, it was held by the company as a source of revenue. It was, therefore, subject to taxation, although there had been no judicial proceedings to enforce the forfeiture of the company's right of exemption from bearing its just proportion of the public burdens. Angell & Ames, sects. 449, 450; *Hooker* v. *Turnpike Company*, 12 Wend. (N. Y.) 371.

Mr. Walter S. Cox, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

In the action of ejectment which is the foundation of this case the defendant in error was plaintiff, and produced evidence which made an unquestioned *prima facie* title to the land, with possession for more than thirty years undisturbed, until the tortious entry of defendant in 1867. On this the canal company recovered judgment; and the only error assigned is, that the court refused to receive evidence of a tax title in the defendant. The tax sale on which this title rested took place in the year 1864.

The statute of Virginia under which the canal company was incorporated contained a provision exempting the canal and its works from taxation; and this was adopted, so far as the company had property in the District of Columbia, by the act of Congress of March 3, 1825, 4 Stat. 101, which authorized the construction of the canal in the District.

As there could be no legal taxes on this property, the sale in 1864 was therefore void, and the offer to prove a tax title was properly rejected.

It is argued in opposition to this view that the canal com-

pany had, by non-user of that part of the canal which constituted the *locus in quo*, forfeited its title and its right of exemption from taxation; and testimony was given to prove this non-user.

But we are of opinion that the question of such forfeiture could only be established by a direct proceeding on the part of the public authorities, and a decision to that effect in a proper tribunal, and cannot be made an issue for the first time in the trial of this question of private right between the present parties. *Judgment affirmed.*

TOWNSHIP OF BURLINGTON *v.* BEASLEY.

Where a statute of Kansas authorized towns or counties to issue bonds "for the purpose of building bridges, or to aid in the construction of railroads, water-power, or other works of internal improvement," and where another statute declared all custom grist-mills to be "public mills," and regulated their management, — *Held*, that bonds issued by a town of that State, to aid in the construction and equipment of a steam custom mill owned by an individual, were authorized by the statute.

IN error to the Circuit Court of the United States for the District of Kansas.

This was a suit brought in the Circuit Court of the United States for the District of Kansas, by Alfred W. Beasley, against the township of Burlington, in the county of Coffey, and State of Kansas, to recover the amount due upon sixty-four coupons, each for the sum of twenty-five dollars, together with interest thereon. Of these coupons, as well as of the bonds to which they had been originally attached, the said Beasley averred himself to have become the true and lawful owner and holder for value before maturity, and also to be such owner at the commencement of his suit.

The bonds to which these coupons had been attached are a part of a series of sixteen bonds, each for the sum of $500, the whole amounting to the sum of $8,000, issued by said township Dec. 3, 1872, to aid one John S. Stow in the construction and completion and to furnish the motive power of a steam custom grist-mill in said township, — the same belonging to the said

Stow, and not being situated on a watercourse, or operated by water-power.

A copy of one of said bonds is as follows, to wit: —

"$500.] BOND OF BURLINGTON TOWNSHIP. [No. 1.

"*County of Coffey, State of Kansas.*

"UNITED STATES OF AMERICA.

"Burlington Township, in the county of Coffey, State of Kansas, promises to pay John S. Stow, or bearer, the sum of $500, on the third day of December, A.D. 1877, and interest thereon at the rate of ten per cent per annum, payable semi-annually, upon presentation of the coupons therefor, hereto annexed: both principal and interest payable at the banking-house of Northrup & Chick, in the city of New York.

"This bond is one of an issue of $8,000, made for the purpose of aiding internal improvements in said township, and in pursuance of an act of the legislature of the State of Kansas, entitled 'An Act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872.

"In testimony whereof, the township trustee, clerk, and treasurer have caused this bond to be issued, duly signed, attested, and countersigned, this third day of December, A.D. 1872.

"H. R. FLOOK, *Trustee.*

"Attest: G. N. MCCONNELL, *Clerk.*

"Countersigned: H. L. JARBOE, *Treasurer.*"

The following is a copy of one of the coupons sued upon, to wit: —

"$25.00.] [No. 3.

"The treasurer of Burlington Township, Coffey County, Kansas, will pay to the bearer twenty-five dollars, at the banking-house of Northrup & Chick, in the city of New York, on the third day of June, A.D. 1874, for six months' interest on bond No. 1, issued on the third day of December, A.D. 1872.

"Attest: G. N. MCCONNELL, *Township Clerk.*
H. R. FLOOK, *Township Trustee.*"

The case comes here on a certificate of division upon the following questions: —

"*First*, Does the second count of the defendant's answer set up a sufficient defence to the action?

"*Second*, Said bonds having been issued to aid a steam custom grist-mill, not situated on a watercourse, or operated by water-power, was there any power or authority to issue the same?

"*Third*, If there was no such power or authority, are the bonds containing the recital therein appearing valid in the hands of a holder thereof for value before maturity, who has no notice of the purpose for which the same were issued, other than as shown by the face of the bonds?"

The plaintiff recovered judgment, and the town now brings the case here by writ of error.

Mr. A. M. F. Randolph, for the plaintiff in error.
Mr. A. L. Williams, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The bonds which are the foundation of this action purport upon their face to be issued by virtue of an act of the legislature of the State of Kansas, approved March 2, 1872, of which the title is given in the bonds. They contain no specific statement of the purpose for which they were issued. There is nothing upon their face to indicate fraud, unlawful assumption of authority, or irregularity. If there was, in fact and in law, authority in the town under any circumstances to issue its bonds, and if these bonds bear the impress of such authority, there is nothing to vitiate them when taken by *bona fide* holders.

The second answer alleges that the bonds were issued to John S. Stow to aid in the construction and completion and to furnish the motive power of a steam custom grist-mill in the town of Burlington, that an election to determine whether they should be thus issued was held under the provisions of the statute referred to, and that a majority of the qualified electors of the town voted in favor of issuing the bonds. Certain proceedings between Stow and the town are also set forth, but as they are not referred to in the briefs, it is not necessary here to allude to them.

The principal contestation of the plaintiff in error is that it

had no power to issue the bonds in question under the statute of March, 1872. Statutes of Kansas, 1872, c. 68, 110.

The first section of this act provides that the trustee, clerk, or treasurer of any municipal township is empowered to issue its bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto or the taking of stock therein, or for other works of internal improvement." Certain restrictions and conditions are imposed, in relation to which no question here arises.

If the motive power intended to be used by Mr. Stow, and to aid in the construction of which these bonds were issued, had been that of water accumulated by dams and discharged upon wheels, the purpose would have been within the specific language of the act. To aid in the construction of "water-power" is one of the purposes named. But the mill was a steam-mill. It was a custom grist-mill operated by steam. Does such an establishment fall within the description of "other works of internal improvement"? This expression is usually applied to railroads and canals. To confine it to those two subjects would be to give to the statute a narrow construction; and that it was not so intended is evident from the ninth section, where "a bridge or other work of internal improvement, except railroads," is three times spoken of. Similar language is used in the eleventh section and in the twelfth section of the act.

A state-house is an internal improvement, as is a county court-house, a jail, or a penitentiary (*Commissioners of Leavenworth Co.* v. *Miller*, 7 Kan. 479), as much as is a railroad, a canal, or a bridge. A mill run by water is declared to be an internal improvement by the statute we are considering. A ferry falls within the same principle, and so does a steam-mill. It would require great nicety of reasoning to give a definition of the expression "internal improvement," which should include a grist-mill run by water, and exclude one operated by steam; or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in and out of the

town upon a railroad, while they were refused the means of grinding their wheat.

Railroads, turnpikes, buildings, bridges, ferries, reclaiming swamps, and the like, are no doubt improvements. If such improvement is within the limits of a town or county, it is internal to such town or county.

The statute of Kansas upon the subject of grist-mills is based upon the idea, and, indeed, upon the declaration, that all grist-mills are public institutions. In c. 65 of the statute of 1868, p. 573, it is thus enacted: "All water, steam, or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills." Regulation is then made for the order in which customers shall be attended to (first come first served), the liability of the miller, his duty in assisting to load and unload, and that the rates of toll shall be conspicuously posted.

Under our recent decision in *Munn* v. *Illinois*, *supra*, p. 112, and the other cases upon kindred subjects, it would be competent to the legislature of Kansas to regulate the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a public work within its meaning, and that the construction and equipment of a steam grist-mill was an internal improvement.

The case of *Loan Association* v. *Topeka*, 20 Wall. 661, will adjudge these bonds to be legal. The point is there expressly made that bonds, when issued for a public purpose, a public use, which it is the right and the duty of the State government to assist, are valid. The issue we are considering falls within this definition. *Judgment affirmed.*

MR. JUSTICE FIELD dissented.

UNITED STATES v. FOX.

1. By a statute of New York, a devise of lands in that State can only be made to natural persons and to such corporations as are created under the laws of the State and are authorized to take by devise. A devise, therefore, of lands in that State to the government of the United States is void.
2. The several States of the Union possess the power to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners.

ERROR to the Court of Appeals of the State of New York.

In February, 1870, Charles Fox, of the city of New York, died possessed of certain personal and real property situated in the State of New York. By his last will and testament, he devised and bequeathed the whole property, after the payment of his debts, to the government of the United States, for the purpose of assisting to discharge the debt created by the war of the Rebellion. By the government of the United States, the body politic, the nation known as the United States was meant. Upon the petition of the District Attorney of the United States, the will was presented for probate before the Surrogate of the city and county of New York. The infant heirs of the deceased contested the will. The Surrogate decreed that the will was inoperative and void as a devise of real estate; that the United States could not lawfully take and hold the real estate as devisee under the will, in trust or otherwise, and that it descended to the heirs-at-law. He at the same time decided that the will was valid and operative as to the personal estate of the testator, and that the United States was the sole legatee; and accordingly admitted the testament to probate as a will of personal estate only. On appeal from the Surrogate, this decree was affirmed by the Supreme Court, and afterwards by the Court of Appeals of the State. The case was then brought here.

Mr. Assistant Attorney-General Smith for the United States.

1. Though there is in the Federal Constitution no express delegation of power to accept a devise, it is submitted that the power of acquiring property for public purposes in any part of the country, by all the usual methods known to the law, is an

essential attribute of the sovereignty of the United States, without which it cannot efficiently exercise its functions. There is no distinction in this respect between real and personal property, or between devises and conveyances. If a State can forbid the government taking by devise, it may forbid its taking by grant.

Marshall, C. J., in his opinion in *United States* v. *Maurice*, 2 Brock. 109, answered the objection that the United States could enter into no contract not previously directed by statute: "The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is as perfect a government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States."

This court indicated its assent to these propositions in *United States* v. *Tingey*, 5 Pet. 128, where it held, "Upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty," &c. It had long before been decided, that, without legislative authority first obtained, suit might be maintained by the United States upon such a contract. "It would be strange to deny to them a right which is secured to every citizen of the United States." *Dugan* v. *United States*, 3 Wheat. 181; *Cotton* v. *United States*, 11 How. 231. Upon judgments recovered in such suits it is an everyday occurrence for the United States to seize, hold, and sell land. *United States* v. *Bradley*, 10 Pet. 359; *United States* v. *Lynn*, 15 id. 311. In 1870, referring to *United States* v. *Tingey*, this court said: "The decision was put upon the ground

that the government had the capacity to make the contract; that the United States were a body politic, and that, as incident to the general right of sovereignty, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the Constitution. *Dugan* v. *United States*, 3 Wheat. 172, was referred to as sustaining this proposition. It was remarked, that a different principle would involve a denial to the general and the State governments of the ordinary rights of sovereignty." *United States* v. *Hodson*, 10 Wall. 407.

Except as involved in the power to borrow money and purchase sites for public works, the power to make contracts is not expressly given by the Constitution, nor is it, in these decisions, placed upon any particular provision of that instrument, but is implied from the existence of a sovereignty to which it is necessarily incident.

There is no express grant of power to take land for public uses by right of eminent domain. For more than three-quarters of our national existence it was exercised only through the assent and agency of the several States. But, though long dormant, it has always existed, and is implied in the very idea of sovereignty. *Kohl* v. *United States*, 91 U. S. 371 *et seq.*

By the exercise of the right of eminent domain land is taken for public uses. If this result can be lawfully secured by a process *in invitum*, it would certainly seem that the United States might also accept land when voluntarily donated or devised. Its power to take and hold land, in order to secure, liquidate, or compromise debts due to it, has been recognized by legislation and judicial decision ever since the early days of the Republic. The validity of the statutes giving priority to such debts is inferred from the clause relating to the payment of the public debt, because this is an appropriate means of accomplishing this object. *United States* v. *Fisher*, 2 Cranch, 396; *Metropolitan Bank* v. *Van Dyck*, 27 N. Y. 437. The act of July 11, 1798, c. 72, § 15, 1 Stat. 594, gives a lien upon the real estate of public debtors, provides for the sale of it, and defeats the lien of prior judgment creditors. *Thelusson* v. *Smith*, 2 Wheat. 396; *United States* v. *Duncan*, 4 McLean, 607, and 12 Ill. 223; *United States* v. *Mechanics' Bank*, Gilpin, 51. A

similar royal prerogative in England "goes back as far as the period of legal memory." *Giles* v. *Grover*, 9 Bing. 128, 192; *Hoke* v. *Henderson*, 8 Dev. (N. C.) 17.

Thus we see that the government may, with the strong hand, not only take land to erect forts and buildings thereon, but to obtain payment of its dues. *Neilson* v. *Lagow*, 12 How. 98–108.

It not only secures lands by right of eminent domain, by conveyance, by levy and sale under execution, but may also, by conquest or by proceedings in confiscation, acquire them without the assent of the State where they lie. *Titus* v. *United States*, 20 Wall. 488; *United States* v. *Huckabee*, 16 id. 434; *Union Insurance Company* v. *United States*, 6 id. 759. Its power to take and hold lands, either by gift, contract, or force, is not derived from, nor can it be defeated by, State legislation.

Mr. James Flynn, *contra*.

1. New York is a sovereign State (4 Cranch, 209; 8 Cow. 686), and the original owner of the land within her limits. N. Y. Const., art. 1, sect. 11. Except in cases where jurisdiction is ceded, she has the sovereign and only right to make laws relating to that land (47 N. Y. 467; 4 McLean, 230; 19 Wall. 676; 17 Johns. 225; 20 How. 558; 5 Pet. 398; 1 Wood. & M. 76–80; 1 Kent, Com. 430); and she has never surrendered the regulation and control of its transmission, by will or devise. 52 N. Y. 534.

The validity of a devise, and the capacity or incapacity to devise, depend upon and are governed by the statutes and judicial decisions of the State within which the land is situate. Story on Conflict of Laws, sects. 465–474; *McCormick* v. *Sullivant*, 10 Wheat. 192; *United States* v. *Crosby*, 7 Cranch, 115; *Kerr* v. *Moon*, 9 Wheat. 565; *Boyce* v. *City of St. Louis*, 29 Barb. 650; *White* v. *Howard*, 46 N. Y. 144; *Levy* v. *Levy*, 33 id. 123, 136, 137; *Aicardi* v. *The State*, 19 Wall. 635.

The statute under consideration regulates the transmission of lands in New York, and in effect declares that they shall be devised only to such natural persons as are by law capable of holding by devise, or to such corporations as the State has expressly authorized, by charter or by statute, to take by devise. *Holmes* v. *Mead*, 52 N. Y. 340. In this case, the only question

was as to the meaning of the statute; and it is well settled that this court will follow the construction given to State statutes by the courts of a State where the title to real property is involved. 18 Wall. 806.

2. The United States cannot take by devise. It exists under and by virtue of a written constitution. It has certain specified powers, and such others as are necessary to carry into effect those expressly granted. All other powers are reserved to the States respectively or to the people. U. S. Const., amend. 10; Story on the Const., sect. 1238; 1 Kent, Com. 251–254. Among its enumerated powers is not that of taking by devise. If it exists, it exists by implication. The experience of a century in peace and war has demonstrated that the government can exist without the power to take by devise, and that the right so to take is not necessary to carry into effect any express power. 1 Kent, Com. 254; Story on the Const., sect. 1239.

But if the power to take may be implied, there is no act of Congress authorizing it. That of May 1, 1820, Rev. Stat., sect. 3736, enacts that "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

3. The United States has no common law. 8 Pet. 658. The appellant assumes, however, that certain common-law prerogatives of the king inhere in the United States, and for that reason are not affected by the statutes of New York.

There is no analogy between the position thus assumed and the principle that "the king is not bound by any act of Parliament, unless he be named therein by special and particular words." This principle only extends to the sovereign by or under whom the law was enacted. 3 Keyes, 125.

New York is sovereign, except where she has surrendered her sovereignty to the United States. The latter is sovereign for specific purposes; each within its proper sphere is independent of the other. 21 How. 506. The United States claims not by virtue of its own laws, but under a will made in professed pursuance of, and depending for its validity upon, the laws of another sovereignty; and it is as much bound by those laws as any foreign state or nation would be, under the same circum-

stances. *Fox* v. *Ohio*, 5 How. 410; *Mayor of New York* v. *Miln*, 11 Pet. 102; *Barker* v. *The People*, 3 Cow. 686.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The sole question for our consideration in this case is the validity of a devise to the United States of real estate situated in the State of New York. The question is to be determined by the laws of that State. It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, hospitals, or for any other of the many public purposes for which such property is used. And when the property cannot be acquired by voluntary arrangement with its owners, it may be taken against their will by the United States in the exercise of their power of eminent domain, upon making just compensation, — a power which can be exercised in their own courts, and would always be resorted to, if, through caprice of individuals or the hostility of the State legislature, or other cause, harassing conditions were attached to the acquisition of the required property in any other way. *Kohl* v. *United States*, 91 U. S. 367.

The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed

under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State.

Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII. there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution in 1777; and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions. That statute provides that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise."

The term "person" as here used applies to natural persons, and also to artificial persons, — bodies politic, deriving their existence and powers from legislation, — but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term "corporation" in the statute applies only to such corporations as are created under the laws of the State. It was so held by the Court of Appeals in *White* v. *Howard*, 46 N. Y. 164, 165, and its construction of the statute is conclusive upon us. A devise to the United States of real property situated in that State is, therefore, void.

Decree affirmed.

HILL v. THOMPSON.

1. This court cannot review the action of the Circuit Court in the exercise of its supervisory jurisdiction over an adjudication of bankruptcy rendered by the District Court.
2. It is immaterial whether such adjudication was upon a summary hearing by the District Court, or after a trial by jury to ascertain the fact of the alleged bankruptcy.
3. *Sandusky* v. *National Bank* (23 Wall. 289) and *Wiswall et al.* v. *Campbell et al., Assignees* (93 U. S. 347), cited and approved.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

Thompson commenced proceedings in involuntary bankruptcy against Hill & Leufestey in the District Court for the Eastern District of Michigan. Hill appeared to show cause against the petition, and, under sect. 5026, Rev. Stat., demanded a trial by jury, "to ascertain the fact of the alleged bankruptcy." Pursuant to this demand a trial was had, which resulted in a verdict finding the facts set forth in the petition to be true; and an adjudication was made accordingly. Exceptions were taken at the trial to the rulings of the court upon the admissibility of testimony, and also to the charge. The proceedings were then carried by writ of error to the Circuit Court, where the judgment of the District Court was affirmed; and this court is now asked to review the action of the Circuit Court by writ of error.

Mr. H. B. Brown for the plaintiff in error.

Mr. C. A. Kent, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The first question presented in this case is one of jurisdiction. In *Sandusky* v. *National Bank*, 23 Wall. 289, we decided that an adjudication of bankruptcy, without a trial by jury, could not be brought here for re-examination by appeal, as the Circuit Court could only review such a proceeding under its supervisory jurisdiction where its action was final. It only remains to consider, therefore, whether a different rule must be applied when the adjudication is after a trial by jury.

The reason why we cannot review the action of the Circuit Courts in the exercise of their supervisory jurisdiction under the bankrupt law, is, as we have already said at the present term, in *Wiswall et al.* v. *Campbell et al., Assignees*, 93 U. S. 347, "that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings."

Going, then, to the bankrupt law, we find, Rev. Stat., sect. 5026, that in cases of involuntary bankruptcy "the court shall proceed summarily to hear the allegations of the petitioner and the debtor;" or "shall, if the debtor . . . so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy." And, also, that "if upon the hearing or trial, the facts set forth in the petition are found to be true, . . . the court shall adjudge the debtor to be a bankrupt." Sect. 5028. From this it is clear that the trial by jury is as much before the court "when sitting as a court of bankruptcy," and as much a part of the suit in bankruptcy, as the summary hearing by the court is when a jury shall not be demanded.

The supervisory jurisdiction of the Circuit Court extends to all cases and questions arising in the District Court when sitting as a court of bankruptcy, and it follows that our jurisdiction is excluded over all such questions and cases. In *Insurance Company* v. *Comstock*, 16 Wall. 258, we held that a writ of error was the "proper process" for the Circuit Court to employ in bringing up for re-examination under its supervisory jurisdiction the questions arising upon a jury trial provided for in sect. 5026; but that does not reach the question here involved, which is, whether the judgment of the Circuit Court in such a proceeding is a final judgment in a civil action. If it is not, we

have no power of review, because only such judgments of that court can be re-examined here. Rev. Stat., sect. 691. We think it is not; and, as the general subject has been so recently before us in *Wiswall et al.* v. *Campbell et al., Assignees*, we content ourselves with a reference in support of this conclusion to the opinion in that case, following, as it does, that in *Sandusky* v. *National Bank*, *supra*.

Writ of error dismissed for want of jurisdiction.

BARNEY v. KEOKUK.

1. In order that the passage-ways of commerce and navigation might be subject to public authority and control, the title to the land under water and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by the common law, vested in the sovereign for the public use and benefit.
2. In England, tide-waters only were regarded as navigable. Hence the rule as to property was often expressed as applicable to them only, although the reason of it would make it apply to all navigable waters.
3. The form, instead of the substance, of the rule has been adopted in many of the States of this country; and in them the public title to the beds and shores of navigable streams is confined to tide-water.
4. From the same cause, the admiralty jurisdiction of the United States was for a long period restricted to tide-water.
5. Since the decision of this court in *The Genesee Chief*, in 1851 (12 How. 443), declaring all the great lakes and rivers of the country navigable that are really such, there is no longer any reason for thus restricting the title of the State, except as a change in that respect might interfere with vested rights and established rules of property.
6. In Iowa, the true rule has been adopted; and it is held that the bed of the Mississippi River and its banks to high-water mark belong to the State, and that the title of the riparian proprietor extends only to that line.
7. This rule applies as well where the land was granted to bound upon the river generally (as in the case of the Half-breed Sac and Fox reservation), as where it was granted according to surveys run along the bank by a meandering line. Hence it applies in the city of Keokuk, which is on that reservation.
8. The public authorities, therefore, have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high water, and make other improvements thereon, necessary to navigation, or public passage by railways or otherwise, without the consent of the adjacent proprietor, and without making him compensation.
9. Although no permanent obstruction, like a depot building, can be erected on the streets of a town, it is held in Iowa that they may, by public authority,

be occupied by railway tracks without the consent of the adjacent proprietor, and without compensation, whether the fee of the streets be in him (as in the city of Keokuk) or in a third person.

10. There is no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein

ERROR to the Circuit Court of the United States for the District of Iowa.

This was an action of ejectment brought by the plaintiff against the city of Keokuk and several railroad companies and a steam-packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings, and sheds on the bank of the Mississippi River, in the city aforesaid. The plaintiff, in his petition, described the premises as follows: "All the land lying and being in front of lots 5 and 6, in block 3, in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River the full width of said lots." The petitioner states that he is the owner in fee-simple of the premises, subject only to the right of the public to use that part of them embraced within the limits of Water Street as a public highway, and is entitled to possession as against the defendants, that the city of Keokuk claims to be the proprietor, and the other defendants occupy as its tenants.

The city, by its answer, admitting that the plaintiff is owner of lots 5 and 6, in block 3, states, in substance, that all the land in front of them down to the Mississippi River was in 1840 dedicated to public use as a street and levee, and, as such, has been used and improved ever since under the possession and control of the city, by virtue of its charter, and has, at its expense, been extended out about two hundred and fifty feet by depositing earth and stone in the river, in order to make the wharf and levee more convenient, safe, and useful. Other defences were interposed, which it is not necessary to specify.

The other defendants claim under authority of the city.

The cause was tried by the court, and a special finding of the facts and the law was made.

From these findings, it appears that the city of Keokuk is situated upon a tract of land lying between the Mississippi and

the Des Moines Rivers, in Lee County, Iowa, known as the "Half-breed Sac and Fox reservation," which, by treaty with the Sac and Fox tribes of Aug. 4, 1824, 7 Stat. 229, was granted to the half-breeds of those tribes, to be by them held in the same manner as other Indian titles are held. The fee, with power of alienation, was subsequently vested in them. Numerous parties became interested in the tract by purchase, and a town was laid out and lots sold as early as 1837; but no regular town plat, having the requisites of the town-plat law of 1839, seems to have been filed or recorded in the recorder's office of the county. One Galland, who seems to have been a part owner, made out such a plat, and filed it; but there is no proof that he had authority for his acts from the other proprietors. In 1840, suit for a partition of the tract was commenced, and regular proceedings were had, resulting, in October, 1841, in a final decree of partition, made according to the report of commissioners, and embodying a plat or map of the town of Keokuk. Said lots 5 and 6, in block 8, are exhibited on this map, and were drawn by the parties under whom the plaintiff claims title. In its findings of fact, the court sets forth portions of the decree, and, amongst other things, the following: —

"In describing each of said shares, the commissioners appointed by the court say, among other things: 'The lots upon Water Street include all the land in front of them to the Mississippi River.'

"And, after describing all the shares, they say: —

"'In describing the boundary of the town-lots situated on Water Street in the towns of Keokuk and Nashville, we have made them to include all the land in front of them to the Mississippi River, by which we mean in front of them, facing the river, parallel with the streets running from Fourteenth Street to Water Street.'

"And in describing the plat of Keokuk, the commissioners' report, among other things, says: —

"'Plat of Keokuk, in the county of Lee, Territory of Iowa, upon the half-breed tract, the outlines of which were designated and marked by Jenefer T. Spring in his survey as town reservation, . . . Water Street is of unequal and irregular width at the points where the dotted lines pass across the same.

"'The street is of the width in feet as is represented by the figures set on said lines.' 'Water Street extends the whole front on river side of the town, or from the intersection of Orleans Street with the

Mississippi River, down the right bank of the river, with the meanders thereof, to the intersection of Cedar Street with the Mississippi River.'"

The Galland map was produced on the trial, also a fragment of another map, which bears date August, 1840, found in the recorder's office. By these, as well as the map embodied in the decree, the space between the front of the lots and the river is designated as Water Street, and appears to have been, at that time, about one hundred feet wide.

As to the occupation of Water Street in front of the plaintiff's lots, and its extension on the river side, the court found: —

"The city of Keokuk has, since the year 1865, caused the space originally covered by water on the river side of Water Street, in front of said lots, to be filled in with earth and stone for a space of over two hundred feet beyond the original water-line to ordinary high-water mark, and about three hundred and fifty-two feet to low water mark, said filling having been done by said city. That part of the space between the front of said lots and the river at ordinary high-water mark is occupied as follows: —

"1. By the freight-house or depot of the defendant, the Keokuk and Des Moines Railway Company, . . . a permanent and substantial frame building. It has been standing a good many years, . . . is used for storing freight by said railroad company, is two hundred and three feet long and twenty feet wide, and one story high, and covers the whole of the front of said lots 5 and 6, block 3.

"2. By the railroad tracks used by the defendants, the Keokuk and Des Moines Railway Company, the Mississippi Valley and Western Railway Company (now St. Louis, Keokuk, and North-western Railway Company), the Toledo, Peoria, & Warsaw Railway Company, and the Toledo, Wabash, and Western Railway Company. Altogether there are ten railroad tracks between the front of said lots and high-water mark.

"3. By the building known as the Keokuk Northern Line Packet depot, . . . a permanent and substantial building, one hundred feet long and fifty feet wide, formed of substantial timbers, and about fourteen or fifteen feet high. It was built by said packet company for its own use in carrying on its business as a common carrier by steamboats on the Mississippi River, and is used by it in connection with its transpcrtation business for the temporary storage of freight

carried or to be carried by said company, and also for the business offices of said company at Keokuk. Said building has five large doors through which teams are driven in delivering or receiving freight, and which doors are closed at night. The building is one and a half stories high, with office rooms on second floor, and the ground-floor is of heavy two-inch lumber laid on sills about two feet apart."

The map shows that this building stands on the newly made ground below original high water.

The court further found: —

"That none of the defendants so occupying said ground, nor the city, has caused any condemnation, nor asked or obtained the permission of plaintiff, nor paid him any damages in compensation for the use of said ground. But they all and severally hold the same under the license or permission of the city of Keokuk only."

As conclusions of law under the foregoing facts, the court found: —

"1. There was no completed statutory dedication of Water Street under the town-plat act of 1839 prior to the decree of partition, for the reason, among others, that all of the proprietors, *i.e.*, the half-breed owners and their grantees, did not join in making a plat, or in selling lots according to the Galland or other plat. What was done prior to the decree was at most a common-law dedication by those who platted or recognized the plat, and it was therefore competent for the decree of partition to provide, as it did, 'that the lots on Water Street should include all the land in front of the lots to the Mississippi River.'"

This leaves the fee of the land constituting Water Street in the plaintiff, subject to the rights of the public.

"2. The additional ground made by filling in Water Street outside of the original water-line partakes of the same character as the original street. The fee of the newly made ground in front of the plaintiff's lots is in the plaintiff, but it is subject to the same public uses as the original street.

"3. Under the law of Iowa, as construed by the Supreme Court of the State, railroad companies, certainly, with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or as at common law; that is, whether the fee is in the city or in the adjoining proprietor.

"4. This, however, does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial depot-building in the street.

"5. In view of the location and situation of Water Street and the presumed intention of the dedication thereof to the public, and guided by the view of the Supreme Court of the State in this regard in *Haight* v. *The City of Keokuk*, and the power of the city as to wharves, and the use of Water Street for that purpose, given to the city of Keokuk by the act of the legislature of 1853, Water Street may be used for levee and wharf purposes under municipal management and control.

"The building erected by the packet company under the contract with the city, of March 28, 1870, for the purposes therein mentioned, for the receipt and temporary shelter and storage of goods, &c., subject to municipal control, is a reasonable use of Water Street as a wharf or levee as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights."

The provisions of the charter of the city of Keokuk, which bear upon the case, are set out in the opinion of the court.

There was a judgment for the defendants, and the plaintiff sued out this writ of error.

Mr. George W. McCrary for the plaintiff in error.

The plaintiff is, by the decision of the court below, the owner in fee of Water Street and the ground in front of it, and they could not, without his consent and without compensation, be taken and devoted by the city to the use of railroad companies, to be covered with tracks for the passage of engines and cars. *Railroad Company* v. *Schurmeir*, 7 Wall. 272.

Even if the fee was vested in the city, the latter could not appropriate it to any use or purpose which would depreciate the value of the premises of an adjoining owner. *Railroad Company* v. *Schurmeir*, *supra;* 1 Redfield on Railways, sect. 8, p. 312; Dillon on Mun. Corp., sects. 558, 576.

The legislature cannot authorize the appropriation of a street for railroad purposes, without compensation to the owner of the fee. *Wagner* v. *Troy Union Railroad Co.*, 25 N. Y. 526; 16 id. 97; 24 id. 655, 658; *Bolling* v. *City of Petersburg*, 3 Rand. (Va.) 563; 13 Conn. 309; 3 id. 90; 5 id. 305; *Imlay* v. *Union Branch Railroad Co.*, 26 Conn. 255; *Ford* v. *Chicago & N. W. Railroad Co.*, 14 Wis. 616; *Pomeroy* v. *C. & M. Rail-*

road Co., 16 id. 640; *Perley* v. *Chandler*, 6 Mass. 453; 21 Wis. 602; 14 id. 609; Cooley on Const. Lim., pp. 546 *et seq.*, 548 and note 2; Dillon on Mun. Corp., sects. 558 and note, 573 and note, 575–577; Redfield on Railways, pp. 299 and note, 309, 311; 14 Ohio St. 548; 7 id. 459; 7 Ind. 479; *Haynes* v. *Thomas*, 3 Hill, 567; *Mahin* v. *Railroad Company*, 24 N. Y. 658; *Bissel* v. *Railroad Company*, 23 id. 61; *Clark* v. *Blackmas*, 47 id. 150; S. P. *Railroad Company* v. *Reed*, 41 Cal. 256; *Harrington* v. *Railroad Company*, 17 Minn. 215–224; *Gray* v. *Railroad Company*, 18 id. 315; *Williams* v. *Plank-road Company*, 21 Mo. 580; *Fletcher* v. *Railroad Company*, 25 Wend. (N. Y.) 462.

In this case there is no pretence of express legislative authority, and the only question is, whether, under a power to regulate streets, the city may, against the objection of the owner of the fee, authorize their use for this purpose. The following authorities hold that the city has no such power: *Wagner* v. *Troy Union Railroad Co.*, 25 N. Y. 526; *Williams* v. *N. Y. Central Railroad*, 16 id. 97; *Presbyterian Society of Waterloo* v. *Auburn Railroad Co.*, 3 Hill (N. Y.), 567; *Lade* v. *Sheppard*, 2 Str. 1004; *Inhabitants of Springfield* v. *Conn. River Railroad Co.*, 4 Cush. (Mass.) 63; *Ford* v. *Chicago & N. W. Railroad Co.*, 14 Wis. 663; *Weisbold* v. *Chicago & N. W. Railroad Co.*, 21 id. 602; *Lackland* v. *North No. Railroad Co.*, 31 Mo. 180; *Craig* v. *Rochester City & Br. Railway*, 39 Barb. (N. Y.) 494; *Warren* v. *State*, 5 Dutch. (N. J.) 393; *Veazie* v. *Penobscot Railroad Co.*, 49 Me. 119; *Brown* v. *Duplessis*, 14 La. Ann. 842; *Pomeroy* v. *Mills*, 3 Vt. 279; Dillon on Mun. Corp., sects. 521, 558; *Flemingsburg* v. *Wilson*, 1 Bush (Ky.), 203; *State* v. *Railroad Company*, 3 Zabr. (N. J.) 360.

It has never been held by the Supreme Court of Iowa that any statute of that State authorizes a municipal corporation to devote one of its streets to the use of a railroad company for laying its tracks and operating its road thereon, without the consent of the owner of the fee, and without compensation where that owner is a private person. The cases of *Milburn* v. *Cedar Rapids*, 12 Iowa, 246; *Clinton* v. *Cedar Rapids & Mo. Railroad Co.*, 24 id. 455; *Slatten* v. *Railroad Co.*, 29 id. 148; *Cook* v. *City of Burlington*, 30 id. 94; *City of Davenport* v. *Stevenson*,

84 id. 225; *Ingraham* v. *Railroad Company*, id. 249; *Cook* v. *City of Burlington*, 36 id. 357; *Chicago, &c. Railroad Co.* v. *Mayor of Newton*, id. 299, relied upon by the court below in support of its decision, do not sustain the converse of this proposition.

The decree in the partition suit passed in 1841 vested the fee of the ground between the lots on Water Street and the Mississippi River in the owners of said lots. *Haight* v. *The City of Keokuk*, 4 Iowa, 199; *Milburn* v. *Cedar Rapids*, *supra*.

The ground in front of plaintiff's lots, in so far as it was ever dedicated to any public use, was dedicated as "Water Street," and this would not authorize its use for levee and wharf purposes. *Pearsoll* v. *Post*, 20 Wend. (N. Y.) 131; *Same* v. *Same*, 22 id. 425; *Prosser* v. *Wapello County*, 18 Iowa, 338; *Prosser* v. *Davis*, id. 367; *Railroad Company* v. *Shurmeir*, 7 Wall. 289; *Pipkin* v. *Wynns*, 2 Dev. (N. C.) L. 402, 404; *State* v. *Wilson*, 42 Me. 27; *Chicago* v. *Lafflin*, 49 Ill. 172; *Eisminger* v. *The People*, 47 id. 384; *Wetmore* v. *Gas-Light Co.*, 42 N. Y. 384; *Denton* v. *Polk County*, 9 Iowa, 596; *Trustees* v. *Railroad Company*, 3 Hill (N. Y.), 569; *Cartelyou* v. *Van Brundt*, 2 Johns. (N. Y.) 356.

The decision of the court below, so far as it is adverse to the plaintiff, ignores, and in effect destroys, his rights and property as a riparian proprietor. *Dutton* v. *Strong*, 1 Black, 1; *Yates* v. *Milwaukee*, 10 Wall. 497; Angell on Tide-Waters, p. 171; *Kraut* v. *Crawford*, 18 Iowa, 553.

The authorities cited by the defendants' counsel to show that the title to the bed of the Mississippi is in the State do not sustain his proposition, that where the bank is extended by either natural or artificial means, so as to raise the bed of the river and make it dry land, it still remains the property of the State. He does not attempt to maintain by any authority that such made land may, by the State or city, be conveyed to private persons for their exclusive use, thus destroying the riparian rights of individuals. When the original bank of the river is filled in, the made ground partakes, not of the nature of the bed of the stream, but of the shore to which it is added. The moment the land was filled in, by whomsoever done, it became the plaintiff's. *Nichols* v. *Lewis*, 15 Conn. 137; *New Orleans* v.

United States, 10 Pet. 622; 12 Curtis, 299. *Atlee* v. *Packet Company*, 21 Wall. 389, is in perfect harmony with this doctrine. The question there was not whether Atlee could be cut off from the navigable channel and his river-front by filling in, as in the case at bar, but whether, without license or authority, except such as arose from his ownership of the adjacent shore, he could lawfully build a pier in that channel.

Much of the argument on the other side may be answered by the simple suggestion that the plaintiff is not suing for the bed of the river, but for high and dry land, occupied by railroad tracks and buildings. Counsel seems to realize this, for in his brief there is no attempt to answer the conclusive suggestion of the court below, that "the additional ground made by filling in Water Street, outside of the original water-line, partakes of the same character as the original street."

Counsel insists upon the power given to the city of Keokuk by its charter to construct a wharf, and to use Water Street for that purpose, but omits to state the important fact that this authority was coupled with an explicit provision that just compensation should be made for private property taken for this purpose. As the charter makes this requirement, there is no foundation for the claim that it authorized the city to take the plaintiff's property without compensation.

Mr. Robert G. Ingersoll for the defendants in error.

By the dedication of Water Street, the legal title to the demanded premises was vested in the city, and not in the adjacent lot-owners. *Hall* v. *The City of Des Moines*, *supra*; *Milburn* v. *Cedar Rapids*, 12 Iowa, 249; *Fulton* v. *City of Davenport*, 17 id. 408; *Yast* v. *Leonard*, 34 id. 15; *Jackson* v. *Hathaway*, 15 Johns. (N. Y.) 448; *Tyler* v. *Hammon*, 11 Pick. (Mass.) 193; *O'Lindar* v. *Lathrop*, 21 id. 292; *Gebhardt* v. *Reeves*, 75 Ill. 304. The plaintiff, as the pretended owner of the street, has, therefore, no right to the possession, or to damages. But, if he were the owner, the use of the street for a purpose not intended by the original dedication would not entitle him to recover. *Warren* v. *The Mayor of Lyons City*, 22 Iowa, 351; *Cook et al.* v. *The City of Burlington*, 30 id. 94; *Pettingill* v. *Devin*, 35 id. 355; *Carpenter* v. *Mooers*, 26 Ill. 162 *Alvis et al.* v. *Morrison et al.*, 63 id. 182.

Plaintiff claims the fee of the made land, on the ground of alleged riparian proprietorship. The Mississippi was, by law, a public highway. The treaty of 1824 with the Sacs and Foxes, reserved the tract whereon Keokuk is situate for the use of the half-breeds, to be held as other Indian titles. In 1832, the Indian right was extinguished. In 1834, the United States vested the fee of the tract in the half-breeds; but no title to the land below high-water mark was conveyed to them. The United States did not own the bed of the river, but, claiming and possessing jurisdiction and sovereignty over that region of country, established, by an act of March 3, 1839, the eastern boundary of the Territory of Iowa as "the middle of the channel of the Mississippi River." When the State was admitted, the same boundary was recognized. It follows that her right to all the land beneath high-water mark was not affected by the grant to the half-breeds, and is as full and complete in front of the site of the city of Keokuk as at any other point on the eastern boundary of the State.

By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. That right was not granted by the Constitution to the United States, but was reserved to the States respectively. And new States have the same right of sovereignty and jurisdiction over the navigable waters within their limits as the original ones. *Martin* v. *Waddle*, 16 Pet. 367; *Goodtitle* v. *Kibbe*, 9 How. 471; *Pollard's Lessee* v. *Hogan et al.*, 3 id. 212; *Pollard* v. *Kibbe*, 14 Pet. 353; *Withers* v. *Buckley*, 20 How. 84; *County of St. Clair* v. *Lovingston*, 23 Wall. 46; *Attorney-General* v. *City of Eau Claire et al.*, 37 Wis. 447.

The State, having the complete and absolute right of property from high-water mark to the middle of the channel of the river, holds it for public uses, subject only to the power of Congress to regulate commerce among the several States and with foreign nations. *McManus* v. *Carmichael*, 3 Iowa, 57, and cases there cited; *Haight* v. *The City of Keokuk*, 4 id. 213; *Prosser* v. *Davis*, 18 id. 371.

The city, when it was organized, had its eastern boundary at low-water mark, and became the riparian proprietor of the

soil in front of Water Street. The State conferred upon it the right to control the wharf privileges and the landing of boats there, but retained, and still retains, in trust for the public at large, the title to the land underneath the channel of the river.

As the Mississippi is navigable, it follows that the rule in regard to the ownership of the bed of navigable waters governs this case. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, Walk. Ch. 168; *Carson* v. *Blazer*, 2 Binn. (Pa.) 475; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 80; *Commonwealth* v. *Alger*, 7 Cush. (Mass.) 94.

The plaintiff, having no grant from the State, acquired in the soil of the river and its banks no *jus privatum*, and none of the riparian rights arising therefrom. *Atlee* v. *Packet Company*, 21 Wall. 389, recognizes the distinction between *jus publicum* and *jus privatum*. While affirming the right of cities and towns to build wharves and project piers into navigable rivers, it declares that a riparian proprietor can exercise such a right only when it has been conferred upon him by express legislative authority. This doctrine is based on the familiar principle that the State, as the absolute owner of the navigable waters within its borders, can dispose of them to the exclusion of riparian owners. *People* v. *Tibbetts*, 19 N. Y. 523; *People* v. *Canal Appraisers*, 33 id. 487; *Mumford* v. *Wardwell*, 6 Wall. 436; Angell on Tide-Waters, 199; *Hudson River Railroad Co.* v. *Loeb*, 7 Robt. (N. Y.) 418.

As the grantors of the plaintiff were never proprietors of the land to the margin of the river, no question of accretions by either alluvion or artificial means can arise. *Bates* v. *Illinois Central Railroad Co.*, 1 Black, 204; *Johnston* v. *Jones et al.*, id. 209; *In re Hull & Selby Railway Co.*, 5 M. & W. 327; *Kraut* v. *Crawford*, 18 Iowa, 551; *Cook* v. *The City of Burlington*, 30 id. 97.

The right of the State, or the city as its authorized agent, to appropriate the lands between high and low water mark for railway tracks, without compensation to the plaintiff, can hardly be considered an open question. *Gould* v. *Hudson River Railroad Co.*, 12 Barb. 628; *Getty* v. *Same*, 21 id. 628; *Gould* v. *Same*, 6 N. Y. 543; *Illinois, &c. Canal Co.* v. *St. Louis*, 2 Dill. 78; *Railroad Company* v. *Stevens*, 10 Am. Law Reg. 168;

Pennsylvania Railroad Co. v. *New York & Long Branch Railroad Co.*, 23 N. J. Eq. 159.

The plaintiff assuming that the track of a railroad is an additional burden, not contemplated in the original dedication, insists that the railroad companies have no right to lay their tracks upon Water Street, without compensation to the adjoining lot-owners. This is not true, whether the fee of the street is in the corporation, or in him. The use of streets is in the public, no matter who holds the fee, and a railroad, being an improved highway, is within the scope of the public purposes for which they were laid out. In Iowa, the lot-owner has no exclusive right to use them. The city is responsible for the condition of the sidewalks, because they are under its control as part of the streets. It can use the entire surface of the street, pave, curb, gutter, build sewers, lay water and gas pipes, permit the erection of telegraph poles and the construction of horse railways. The running of a railway car, whether propelled by horse or steam power, is not a permanent obstruction of the street. The track itself, when laid down by the railroad companies, under the direction of the proper authorities, and properly planked or paved, so as not to obstruct materially the passage of persons and vehicles over it, is not a burden for which compensation should be claimed. If it was so considered, a city having the fee of streets would be entitled to compensation for laying such tracks without its consent. But in Iowa, where it holds the naked title for public use, no such right accrues. So with the abutting lot-owner, in case of a common-law dedication. The use of a street for railway tracks makes no change in the title. Only a license or an easement is secured, which is no more a nuisance or a purpresture to him, than the laying of gas-pipes or the building of sewers.

The State has, by statute, given to railway companies the right to run upon highways and across streams, and subjected lands used for public purposes to the easement of railway tracks. In such cases the fee abides in the owner, whereas, in condemnation, he is divested of his title, and the public or the State takes his entire interest. We insist, therefore, that an individual has no right to compensation for such use of the street as in this instance the municipality has authorized.

If he has sustained some special damage, he can recover for it, but for none other. *Ingram et al.* v. *C. D. & M. Railroad Co.*, 38 Iowa, 675; *Gear* v. *The C. C. & D. M. Railroad Co.*, 39 id. 25; *Casby* v. *Owensboro' & Russellville Railroad Co.*, 10 Bush (Ky.), 291; *Tompkins* v. *Hodgson et al.*, 2 Hun (N. Y.), 148; *Warren* v. *Grand Haven*, 30 Mich. 28; *Chicago, Rock Island, & Pacific Railroad Co.* v. *City of Joliet*, 2 West. Jurist, 667.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below that the dedication of the streets of Keokuk was a dedication at common law, and not under the statute; and that, in making this dedication, the original proprietors of the tract reserved the title to the soil in the street, particularly in Water Street; and that this title went with the several lots fronting on the street, and extended to the Mississippi River. Whether, under the laws of Iowa, it also attached to the new ground formed by filling in upon the bed of the river is not so clear. It appears to be the settled law of that State that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus* v. *Carmichael*, 3 Iowa, 1. The above conclusion was reached, and has always been adhered to in that State. *Haight* v. *The City of Keokuk*, 4 Iowa, 199; *Tomlin* v. *Dubuque, &c. Railroad Co.*, 32 id. 106.

The peculiar origin of the title to the "Half-breed Sac and Fox reservation," in the peninsula lying between the rivers Mississippi and Des Moines, did not take it out of the general rule. This was so held in *Haight* v. *The City of Keokuk*, *supra*.

That case was nearly identical with the present as respects the claim of the adjoining proprietor to the title of the land in Water Street and on the river bank. Haight contested the right of the city to control the wharf along said street, claiming, by virtue of his fee-simple title, the right to erect a private wharf and to receive the emoluments thereof. His claim was overruled, and on the question of title the court said:—

"According to the case of *McManus* v. *Carmichael*, then, Haight owns the soil to high water only. But here is interposed the argument, that this land is not held under the United States by the usual manner of grants, that is, by patent, after a survey, and described by section, town, and range. This is true; but yet it will not affect the extent of the complainant's right. The grant to the half-breeds was to them as persons and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or States, and then the line would have been the *medium filum aquæ*, as it is now between Iowa and Illinois. . . . The grant was to them as individuals, — as tenants in common, — and is to be construed as any other grant or sale to individuals."

The court then goes on to refer to various cases to show that the government cannot convey the land between high and low water on the public or navigable rivers, but that this space belongs to the State; citing *Mayor of Mobile* v. *Eslava*, 9 Port. 578; 16 Pet. 234; *Pollard's Lessee* v. *Hagan*, 3 How. 212.

It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although the reason of the rule would equally apply to navigable waters

above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passage-ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367, *Pollard's Lessee* v. *Hagan*, 3 How. 212, and *Goodtitle* v. *Kibbe*, 9 id. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject.

The exhaustive examination of this question by the Supreme Court of Iowa in 1856, in the case of *McManus* v. *Carmichael*, 3 Iowa, 1, really leaves nothing to be said. The precise point was directly before the court, — namely, whether the title of the riparian proprietor extends below high water, in the Mississippi River; and it was decided that it does not. This decision has been followed by subsequent cases, especially the cases of *Haight* v. *The City of Keokuk*, 4 id. 199; and *Tomlin* v. *Dubuque Railroad Co.*, 32 id. 106.

But whatever may be the true rule on this vexed question, and whether we rightly comprehend the Iowa decisions or not, we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the river side, by filling in below high water, and building wharves and levees for the public accommodation. By the charter of the city, passed Dec. 18, 1848, it was provided, —

"SECT. 14. That the city council shall have power . . . to establish and constitute landing-places, wharves, docks, and basins in said city, at or on any of the city property, and fix the rates of landing, wharfage, and dockage of all steamboats, boats, rafts, and other water-crafts, and of all goods, wares, merchandise, produce, and other articles that may be moored at, landed on, or taken from any landing, wharf, dock, or basin belonging to said city."

"SECT. 16. That the city council shall have power . . . to license and establish ferries across the Mississippi River from said city to the opposite shore, to fix the rates of the same." . . .

"SECT. 22. The city council shall have exclusive power to establish and regulate the grade of wharves, streets, and banks along the Mississippi River, within the corporate limits of said city."

And by a supplement, passed Jan. 22, 1853, it was provided, —

"SECT. 7. The said city of Keokuk shall have the power to establish and regulate wharf or wharves in said city, and more particularly to use the whole of Water Street for said purpose." . . .

Although it should be conceded that the title of the plaintiff attached to the ground reclaimed and filled in by the city outside of the original high water, it was a bare legal title, subject to the public easement and use, not only for street purposes,

but for the purposes of wharves, landings, and levees. A street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purposes of access to the river, and the usual accommodations of navigation in such a connection. This subject is discussed in Haight's case, where the court said, —

"One further thought, presented by the petitioner, should be noticed. It is, that if this ground is dedicated to the public, it is as a street only; and that if his rights are subject to the public uses, they are so subject to the use of it only as a street or highway, and not as a wharf, and that it is named and called a street and not a wharf. He claims that the object of a street is for passage, for travelling over, and not to land or deposit goods upon. This is taking a very narrow and close view. The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily, in their transit to the storehouse; and so of other things, and so it is of the wharf. If goods cannot be deposited upon it in preparation for shipping them, or unladen upon it from boats and vessels, why is a town located near the river upon land which, in other respects, is inconvenient, and is expensive to grade, to bring into form and order, and to keep in repair, instead of upon an even prairie, requiring no such trouble and outlay?"

On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent land-owner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes, and the like; and, according to the laws of Iowa (which must be taken to govern the case), it may be occupied by those improved iron ways for public passage which modern skill has devised, and which the advance of general improvement requires. It cannot be

denied that horse-railroads have contributed immensely to the public convenience in furnishing a rapid, cheap, and convenient means of communication between different parts of large towns, and have greatly promoted their increase and growth in wealth and population. By the accommodation which they afford, the citizen can reside miles from his shop or place of business. Though attended with some inconveniences, they have greatly added to the efficiency of the public thoroughfares, and have more than doubled their capacity for travel and transportation.

So other railways coming to cities add greatly to their population and wealth, and furnish greatly increased facilities of communication with other portions of the country.

In Iowa, by the act called the "Right of Way Act," found in the Code of 1851, sect. 785, it is declared that, —

"The county court may also grant licenses for the construction of any canal or railroad, or any macadamized or plank-road, or any other improvement of a similar character, or any telegraph line, to keep the same up for a period not exceeding fifty years, and to use for this purpose any portion of the public highway or other property, public or private, if necessary: *Provided*, such use shall not obstruct the highway." Iowa Revision of 1860, p. 206.

By the construction given to this act by the Supreme Court of the State, railroads, especially when located and constructed under municipal regulation and control, are not regarded as obstructions to a highway in the legal sense, nor as creating, when laid thereon, any injury to the proprietors of the adjacent lands, for which they are entitled to compensation. The cases referred to by the Circuit Court (which are given below) abundantly demonstrate this conclusion, and no elaborate discussion of the subject is required from us. See *Milburn* v. *Cedar Rapids*, 12 Iowa, 249–260; *Clinton* v. *Cedar Rapids & Mo. Railroad Co.*, 24 id. 455; *Tomlin* v. *Dubuque Railroad Co.*, 32 id. 106; *Chicago, Newton, & S. W. Railroad Co.*, 36 id. 299; *Cook* v. *City of Burlington*, id. 357; *Clinton* v. *Clinton & Lyon Railroad Co.*, 37 id. 61; *Ingraham et al.* v. *Chicago, Dubuque, & Minn. Railroad Co.*, 38 id. 669.

The cases cited, it is true, are generally those in which the fee of the streets was in the cities respectively, as is commonly

the case in Iowa. But in Haight's case, in 4 Iowa, the very street now in question was under consideration, and the plaintiff had the same title as that of the plaintiff in the present case; and the principles laid down in all the later cases apply as well where the title of the soil is in the adjacent proprietor as where it is in the city or a third party. And, as before remarked, we can perceive no well-founded difference in principle between the one and the other as to the rights of the public.

The Circuit Court is clearly correct, however, in holding that the construction of a permanent freight depot in Water Street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created or allowed. It is subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public.

We also concur in the view taken by the Circuit Court as to the reasonableness of the erection of the packet depot in the place where it is located. It is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation, and does not occupy any portion of the original street. It is a public use of the river bank, which is absolutely necessary to the use of the river as a navigable water. The erection of levees, wharves, and other accommodations on the very ground appropriated to such purposes by the original plot of the town, or, stronger still, on ground made and reclaimed from the bed of the river adjoining the street thus appropriated, and in enlargement thereof, is clearly within the powers of the city authorities as laid down in the cases referred to. *Judgment affirmed.*

MR. JUSTICE MILLER did not sit in the case, nor take any part in deciding it.

FIRST NATIONAL BANK OF WASHINGTON v. WHITMAN.

1 The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. *So held*, where a check of the Treasurer of the United States upon a national bank duly designated as a depositary of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank.

2. The rights of the parties are not changed by the fact that, on a settlement of accounts between the Treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the bank. Such an error does not affect the real state of the accounts; when it is discovered, they are open to correction.

3. Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Argued by *Mr. A. G. Riddle* and *Mr. F. Miller* for the plaintiff in error, and by *Mr. S. Shellabarger* and *Mr. J. Daniels* for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the Court.

This action is brought against the First National Bank of Washington to recover the amount of a check drawn upon it by Mr. Spinner, Treasurer of the United States, for $3,414. dated March 9, 1867. The check is in this form, viz.: —

"*Draft No.* 9,243 *on War Warrant No.* 915.

"$3,414.] TREASURY OF THE UNITED STATES,
"WASHINGTON, March 9, 1867.

"Pay to the order of Mrs. E. S. Kimbro, three thousand three hundred and fourteen dollars. No. 9,243. Registered March 9, 1867.

"Issued on requisition No. ——. $3,414.

"S. B. COLBY,
"*Register of the Treasury.*
"F. E. SPINNER,
"*Treasurer of the United States.*

"To the First National Bank of Washington, D. C."

It was indorsed in the name of Mrs. Kimbro without authority, and the amount of it was paid by the bank to an unauthorized holder. It appears from the testimony of Mr. Tayler, first comptroller of the treasury, that the funds of the government deposited by the Treasurer in a national bank are treated by the government, for the purposes of keeping accounts, as in the Treasurer's own charge and custody; that they are charged to him, and that payments made are credited to him, and that he is chargeable precisely as if the funds had been in his own office, and that he had power to make the check in question.

We may, therefore, simplify the case by eliminating from its consideration all reference to the United States, and consider the transaction as between Mr. Spinner, as an individual, and the bank, as his depositary, and Mrs. Kimbro, as the payee of his check.

The question is this: Can the payee of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn, upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon principle and authority, that the payee of a check unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis in delivering the judgment of this court in *Bank of the Republic* v. *Millard*, 10 Wall. 152, leaves little to add upon this subject by way of illustration or authority. In that case a paymaster of the army made his check on the Bank of the Republic to the order of Captain Millard for $859, due to him for arrears of pay as an officer of the army. The bank paid the amount of the check upon a forged indorsement of Millard's name. Recovering the check and exposing the forgery, Millard demanded payment to himself, and, upon refusal, brought his action against the bank. This court held that the action could not be maintained, upon the principle that there was no privity between the bank and Millard. The bank's contract was with the paymaster only, and to him only was its duty. It received no money from Millard. It never promised Millard to pay him any money. It

had no money belonging to him. It received money from the paymaster, upon an agreement that it would return it to him when called for by him in person, or that it would pay it upon his checks. But it made no such agreement, or any agreement, with Millard. For a failure of duty in this respect it was responsible to the paymaster, with whom it made the contract, and to no one else. If the check was not paid, the arrears of pay to Millard were not paid, and his claim upon the government or the paymaster was not impaired by the giving of the check, which, being presented in due time, was not paid. He was still entitled to demand his arrears.

That case is a perfect and complete authority upon the question stated. See also *Artuer* v. *Bank*, 46 N. Y. 82.

Nor is this principle confined to checks or bills. Thus, in *Ashley* v. *Dixon*, 48 N. Y. 430, it was held that if A. be under a contract to sell property to B., and C. persuade A. to sell the property to him, no action lies by B. against C. There is no privity of contract between C. and B., but the remedy of the latter is against A. only.

It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Espy* v. *Bank of Cincinnati*, 18 id. 604.

It may accomplish the same result by writing upon it the word "good," or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. *Cook* v. *State Bank of Boston*, 52 N. Y. 96. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *Bank* v. *Leach*, 52 N. Y. 350; *Meads* v. *Merchants' Bank*, 25 id. 143; 9 Met. 311; 2 Duer, 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially

changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee.

It is said that this fact of a contract between the payee and drawee exists in the present case. The testimony of Mr. Arnold is referred to, to the effect that in April, 1867, the bank made its weekly statement to Mr. Spinner of deposits received and payments made, returning the draft of Mrs. Kimbro as paid on the 22d of that month, and that in the statement the amount of the draft was entered to the credit of the bank.

There is no suggestion in the evidence that either the bank or Mr. Spinner knew that the indorsement of the payee was unauthorized. The bank, we assume, would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive it. We assume, also, as we are bound in justice to it to do, that it would not ask Mr. Spinner to give credit for a payment that it knew to have been illegally made, and that it would not attempt to deceive him into the belief that a pretended indorsement was a real one. It comes to this, then, that, upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is, that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bank-book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Story, Eq. Pl., sects. 799–801; Story, Eq. Jur., sects. 523, 527; *Buchlin* v. *Chaplin*, 1 Lans. 443; *Bruen* v. *Hone*, 2 Barb. 586; *Bullock* v. *Boyd*, 2 Edw. 293. We cannot perceive that such a mistaken recognition of the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft.

It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent.

Without discussing the other questions argued, we are of the opinion, for the reasons given, that the plaintiff below was not entitled to recover.

Judgment reversed, and cause remanded for a new trial, or for such further proceedings as the parties may be advised to take.

EX PARTE FLIPPIN.

1. This court cannot, by *mandamus*, compel an inferior court to reverse a decision made by it in the exercise of its legitimate jurisdiction.
2. *McCargo* v. *Chapman*, 20 How. 555, so far as it conflicts with this doctrine, disapproved.

PETITION for a writ of *mandamus* to the Circuit Court of the United States for the Western District of Tennessee.

Talmadge E. Brown, having a decree in the Circuit Court of the United States for the Western District of Tennessee against the city of Memphis, made application on the law side of that court for a *mandamus* requiring the city and its mayor and general council to levy and collect a tax for the payment of the amount due him. In this application the name of the person then holding the office of mayor was given, and also the names of the persons who constituted the general council. An alternative writ was issued; and the parties named all appeared by the city attorney, and showed cause against the application. March 30, 1875, a final judgment was entered in the cause, "by which it was ordered and adjudged that a peremptory writ of *mandamus* should issue, commanding the city of Memphis and its said general council to proceed each year, for the then ensuing three years, 1875, 1876, and 1877, to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient in amount to realize $125,000 each year for the years 1875 and 1876, and for the year 1877 to realize a sum sufficient to pay whatever sum might then remain unpaid of the said decree. It was further ordered that the clerk of said court, whenever the said Brown should request the same, should issue each year, during the years 1875, 1876, and 1877, respectively, a peremptory writ of *mandamus*, in accordance with said judgment, to be served on the city of Memphis and its mayor and general council, in the manner prescribed by law."

Flippin became mayor of the city, and the other petitioners members of the general council, Jan. 15, 1876. The clerk of the court, at the request of Brown, issued, May 24, a peremptory writ, returnable the fourth Monday in November, directed to the city and to the petitioners by name, as mayor

and members of the general council, requiring them to levy the adjudged tax for the year 1876. Nov. 27, 1876, the petitioners moved the court "to set aside and quash" this writ, for the reason, in substance, that they were not parties to the judgment upon which it was issued. This motion was denied Dec. 14, 1876; and the court, by proceeding against the petitioners for contempt in failing to obey the writ, is now endeavoring to compel them to perform the duties which the judgment enjoined upon the city and its mayor and general council.

Pending these proceedings, this application is made here for a *mandamus* requiring the judge of the Circuit Court to quash the writ.

Mr. W. Y. C. Humes and *Mr. S. P. Walker* for the relators.

The proceeding by *mandamus* in this court is the proper and only remedy of the relators.

An order of the Circuit Court, quashing or refusing to quash a writ, cannot be reviewed on a writ of error. *Mounts* v. *Hodgson*, 4 Cranch, 324; *Boyle* v. *Zacharie*, 6 Pet. 648; *Toland* v. *Sprague*, 12 id. 300; *McCargo* v. *Chapman*, 20 How. 555.

In the latter case, this court declared that if an execution should be issued, not authorized by the judgment, and the court below should refuse to quash it, a *mandamus* would seem to be the proper remedy. "It is a writ which may be issued to inferior courts and magistrates, to require them to execute that justice which the party is entitled to, and which by law they are enjoined to do, and where there is no other remedy."

Ordinarily, this court will not do more than compel the Circuit Court to act, and render some judgment, in a case of which it has improperly refused to take jurisdiction. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *Insurance Company* v. *Comstock*, 16 id. 270.

While a *mandamus* will not lie to control the judicial discretion of the Circuit Court, by dictating what judgment it shall render, it is the appropriate means of preventing the execution of a writ sued out by order of an inferior court against persons not parties to the proceeding.

Mr. William M. Randolph, contra.

The order of the Circuit Court, refusing to quash a writ in execution of a judgment or a decree which is final, is not subject

to revision or reversal by *mandamus* by any other court. *Ex parte Newman*, 14 Wall. 152; *Ex parte De Groot*, 6 id. 497; *United States* v. *Addison*, 22 How. 174.

The discretion of the court below was invoked and exercised, and no other court has authority to supervise its action. High on Extraordinary Legal Remedies, sects. 156, 176, and the cases cited; *Wylie* v. *Cox*, 14 How. 1; *Connor* v. *Peugh*, 18 id. 394; *Warren* v. *Norton*, 20 id. 448; *The Secretary* v. *McGarrahan*, 9 Wall. 298; *Litchfield* v. *The Register and Receiver*, id. 575.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The writ of which the petitioners complained was one of execution to carry into effect the judgment in the original suit for the *mandamus*. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment is satisfied." *Wayman* v. *Southard*, 10 Wheat. 23. "Process subsequent to judgment is as essential to jurisdiction as process anterior to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Riggs* v. *Johnson County*, 6 Wall. 187. But if the court has jurisdiction to issue process, it has necessarily jurisdiction to decide as to its appropriate form. Here the process has been issued; and the court, upon motion, has decided that it was good in form, and ought not to be quashed. Of this decision the petitioners complain, and seek to have it reversed. This we cannot do by *mandamus*. Under that form of proceeding we may compel an inferior court to decide upon a matter within its jurisdiction and pending before it for judicial determination, but we cannot control its decision. Neither can we in that way compel the inferior court to reverse a decision which it has made in the exercise of its legitimate jurisdiction. That is the office of a writ of error or an appeal, in cases to which such proceeding applies, but not of a writ of *mandamus*. If there is any thing in the case of *McCargo* v. *Chapman*, 20 How. 555, to the contrary of this, it is disapproved. *Petition denied.*

CROMWELL v. COUNTY OF SAC.

1. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.
2. In an action against a county in Iowa upon certain interest coupons originally attached to bonds issued by the county for the erection of a court-house, it was found and determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value; and, inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover. *Held*, that the judgment did not estop the plaintiff, holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing, in a second action against the county, that he acquired such other bonds and coupons for value before maturity.
3. The finding in one action that the plaintiff therein is the holder and owner of certain coupons in suit does not estop the defendant from showing, in another action, that such plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. The finding only establishes the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

ERROR to the Circuit Court of the United States for the District of Iowa.

The action was on certain bonds and coupons thereto attached, issued by the county of Sac, in the State of Iowa. The facts are sufficiently stated in the opinion of the court. The defendant obtained judgment, and the plaintiff brought the case here.

Mr. John N. Rogers for the plaintiff in error.

Mr. Galusha Parsons, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action on four bonds of the county of Sac, in

the State of Iowa, each for $1,000, and four coupons for interest, attached to them, each for $100. The bonds were issued in 1860, and were made payable to bearer, in the city of New York, in the years 1868, 1869, 1870, and 1871, respectively, with annual interest at the rate of ten per cent a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law

are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram* v. *Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because, in a previous action for a similar trespass, they had set up the same title, and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." And in the

case of *Gardner* v. *Buckbee*, 3 Cowen, 120, it was held by the Supreme Court of New York that a verdict and judgment in the Marine Court of the city of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of the Duchess of Kingston was cited, and followed: "That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. In the case of *Miles* v. *Caldwell*, reported in the 2d of Wallace, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein, as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and had been passed upon by them. The court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and

by inevitable implication also held that, in the absence of proof in such cases, the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined.

But it is not necessary to take this doctrine as a matter of inference from these cases. The precise point has been adjudged in numerous instances. It was so adjudged by this court in the case of *The Washington, Alexandria, & Georgetown Steam Packet Co.* v. *Sickles*, reported in the 24th of Howard. In that case, an action was brought upon a special parol contract for the use of Sickles's cut-off for saving fuel in the working of steam-engines, by which the plaintiffs, who had a patent for the cut-off, were to attach one of their machines to the engine of the defendants' boat, and were to receive for its use three-fourths of the saving of fuel thus produced, the payments to be made from time to time when demanded. To ascertain the saving of fuel an experiment was to be made in a specified manner, and the result taken as the rate of saving during the continuance of the contract. The plaintiffs in their declaration averred that the experiment had been made, at the rate of saving ascertained, and that the cut-off had been used on the boat until the commencement of the suit. In a prior action against the same defendant for an instalment due, where the declaration set forth the same contract in two counts, the first of which was similar to the counts in the second action, and also the common counts, the plaintiffs had obtained verdict and judgment; and it was insisted that the defendant was estopped by the verdict and judgment produced from proving that there was no such contract as that declared upon, or that no saving of fuel had been obtained, or that the experiment was not made pursuant to the contract, or that the verdict was rendered upon all the issues, and not upon the first count specially. The Circuit Court assented to these views, and excluded the testimony offered by the defendants to prove those facts. But this court reversed the decision, and held that the defendants were not thus estopped.

"The record produced by the plaintiffs," said the court, "showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity

of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration

may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau* v. *Rutlin*, 2 Exch. 665, 681; *Hughes* v. *Alexander*, 5 Duer, 493.

The case of *Howlett* v. *Tarte*, 10 C. B. N. S. 813, supports this view. That was an action for rent, under a building agreement. The defendant pleaded a subsequent agreement, changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer, the replication, after full argument, was held bad. In deciding the case, Mr. Justice Willes said: "It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. . . . I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice Byles said: "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence." Mr. Justice Keating said: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

The language of the Vice-Chancellor, in the case of *Henderson* v. *Henderson*, 3 Hare, 100, 115, is sometimes cited as expressing a different opinion; but, upon examining the facts of that case, it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case, a bill had been filed in the Supreme Court of Newfoundland, by the next of kin of an intestate, against A. and others, for an account of an estate and of certain partnership transactions. A decree was rendered against A., upon which the next of kin brought actions in England. A. then filed a bill there against the next

of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him, and alleging various errors and irregularities in the proceedings in the Supreme Court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that court. It was with reference to the necessity of having the subject of particular litigation, as a whole, at once before the court, and not by piecemeal, that the Vice-Chancellor said: —

"In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground.

If, now, we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith, that the county of Sac, by a vote of its people, authorized the issue of

bonds to the amount of $10,000, for the erection of a court-house; that bonds to that amount were issued by the county judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds the contractor gave one of them as a gratuity to the county judge; and that the court-house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become, before their maturity, the holder of twenty-five coupons, which had been attached to the bonds, but there was no finding that he had ever given any value for them. The court below held, upon these findings, that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show that he had given value for the coupons; and, not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bona fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was

nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented, we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

Judgment reversed, and cause remanded for a new trial.

MR. JUSTICE CLIFFORD dissenting.

Ten bonds, each for the sum of $1,000, were issued by the county for the purpose of erecting a court-house in the county seat of the county; and it appears that the bonds were made payable to bearer, one each succeeding year, till the whole were paid, with interest at the rate of ten per cent per annum. Four of the bonds are the subject of the present controversy, and the defence is the estoppel of a prior judgment in favor of the county in a suit brought to collect certain of the interest warrants annexed to the bonds.

Sufficient appears to show that the bonds were in due form, and that they contain the recital that they "were issued by the county, in accordance with the vote of the legal voters thereof, at a special election holden on the day therein mentioned, pursuant to a proclamation made by the county judge, according to the statute of the State in such case made and provided."

Annexed to the bonds were the coupons for the payment of the annual interest, and the plaintiff in the prior suit, being

the holder of twenty-five of the coupons, instituted the suit to recover the amount, and he alleged in his declaration that he was the holder and owner of the same; that he received the coupons in good faith before their maturity, and that he paid value for the same at the time of the transfer; that the bonds and coupons were issued by the county under and by virtue of a legal and competent authority, and that the same are valid and legal claims against the corporation.

Most of the allegations of the declaration were denied in the answer; but the defendants did not specifically deny that the plaintiff paid value for the coupons at the time he became the holder and owner.

Special findings of the facts were made by the court, from which it appears that the question whether a court-house should be built, and whether a tax sufficient to liquidate the expense should be levied, were duly submitted to the voters of the county; that the propositions were adopted at a special election held for the purpose; that the county judge made the contract for the erection of the court-house; and that he duly executed the ten bonds in question, and delivered the same to the contractor, in pursuance of the contract.

Proof of a satisfactory character was exhibited that the contract between the judge and the contractor was made in the county where the judge resided: but the court found that the bonds were signed, sealed, and delivered by the judge during his temporary absence in another county; and the findings show that the plaintiff became the owner and holder of the coupons before maturity and after the proceedings were correctly entered in the minute-book; nor is it found that the plaintiff had any notice whatever of the supposed irregularities.

Evidence of fraud in the inception of the contract is entirely wanting, except what may be inferred from the unexplained fact that the contractor gave one of the bonds, as a gratuity, to the county judge as soon as he delivered the same to the contractor. Beyond all doubt, the contractor proved to be unworthy, as he never performed his contract, or paid back the consideration.

Judgment was rendered for the defendants in the court below; and the majority of this court affirmed the judgment,

holding that the evidence showed that the bonds were fraudulent in their inception, and that the plaintiff could not recover, inasmuch as he did not prove affirmatively that he paid value for the bonds.

Authorities are not necessary to show that the transferee of a negotiable instrument made payable to bearer, subsequent to its date, holds it clothed with the presumption that it was negotiated to him at the time of its execution, in the usual course of business and for value, and without notice of any equities between the prior parties to the instrument. *Goodman* v. *Harvey*, 4 A. & E. 870; *Goodman* v. *Simonds*, 20 How. 365; *Nexon* v. *De Wolf*, 10 Gray, 346; *Ranger* v. *Cary*, 1 Met. 373.

Coupons are written contracts for the payment of a definite sum of money on a given day, and, being drawn and executed in a given mode, for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. *Knox County* v. *Aspinwall*, 21 How. 544; *White* v. *Railroad*, 21 id. 575; *Aurora* v. *West*, 7 Wall. 105; *Murray* v. *Lardner*, 2 id. 121.

Possession of the instrument is plenary evidence of title until other evidence is produced to control it, the holder being entitled to the same privileges and immunities as an indorsee of a bill of exchange or promissory note payable to bearer or indorsed in blank. He is not subject to any equities as between the promisor and original payee, nor to the set-off of any debt, legal or equitable, which the latter may owe to the former. *Pettee* v. *Prout*, 3 Gray, 503.

Title and possession are one and inseparable to clothe the instrument with the *prima facie* presumption that it was indorsed at the date of its execution, and that the holder paid value for it, and received it in good faith in the usual course of business, without notice of any prior equities. Evidence to show that he paid value for the instrument is unnecessary in the opening of his case; but the defendant may, if he can, give evidence that the consideration was illegal, that the instrument was fraudulent in its inception, or that it had been lost or stolen

before it was negotiated to the plaintiff; and, if the defendant proves such a defence, it will follow that it must prevail, unless the plaintiff proves that he gave value for the instrument in the usual course of business, in which event he is still entitled to recover. *Fitch* v. *Jones*, 5 El. & Bl. 238; *Smith* v. *Braine*, 16 Q. B. 243; *Hall* v. *Featherstone*, 3 Hurls. & Nor. 287.

Applying that rule to the case as it was first presented, it would seem that the plaintiff should have prevailed, as it is clear that the defendant did not give any sufficient evidence to show that the consideration of the instruments was illegal, or that they were fraudulent in their inception, or that they had been lost or stolen before the plaintiff became the holder of the same, without notice of any prior equities.

Suffice it to remark, in this connection, that these views were urged against the former judgment; but they did not prevail, and the judgment was rendered for the defendant, which is unreversed and in full force. Suit is now brought upon the bonds to which those coupons were attached, and the sole question of any importance is whether the judgment in the former case is a bar to the present suit.

Nothing can be more certain in legal decision than the proposition that the title to the bonds and coupons are the same, as the coupons were annexed to the bonds when the bonds were executed and delivered to the original holder, in pursuance of the contract for building the court-house; and it is equally certain, that if it could be proved in defence that the consideration was illegal, or that the instruments were fraudulent in their inception, or that they had been lost or stolen before they were negotiated to the holder, the defence would apply to the bonds as well as the coupons.

Before proceeding to examine the legal question, it should be remarked that the former suit was prosecuted in the name of a different plaintiff; but the theory of the present defendants is that the present plaintiff was the real owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. Testimony to prove that theory was offered in the court below, and the majority of the court now hold that evidence to prove that proposition was properly admitted. Assume that to be so, and it follows that the parties, in legal

contemplation, are the same; nor can it be denied that the cause of action, within the meaning of that requirement, as expounded and defined by decided cases of the highest authority, is the same as that in the former action, the rule being that the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title and depends upon the same question. *Outram* v. *Morewood*, 3 East, 346.

Holders of negotiable securities, as well as every other plaintiff litigant, are entitled to a full trial upon the merits of the cause of action; but if in such a trial judgment be rendered for the defendant, whether it be upon the verdict of a jury or upon a demurrer to a sufficient declaration, or to a material pleading involving the whole merits, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause, upon the same grounds as those disclosed in the first declaration, for the reason that the judgment, under such circumstances, determines the merits of the controversy, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex* v. *Kingston*, 20 State Trials, 588; *Kitchen* v. *Campbell*, 2 W. Bl. 831; *Clearwater* v. *Meredith*, 1 Wall. 43; *Ricardo* v. *Garcias*, 12 Cl. & Fin. 400.

Allegations of an essential character may be omitted in the first declaration and be supplied in the second, in which event the judgment on demurrer in the first suit is not a bar to the second, for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action. *Gilman* v. *Rives*, 10 Pet. 298; *Richardson* v. *Barton*, 24 How. 188; *Aurora City* v. *West*, 7 Wall. 90.

Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue, the rule in such a case being that where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and that the whole defence might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judg-

ment in such a case is conclusive between the parties. *Outram* v. *Morewood*, 3 East, 358; *Greathead* v. *Broomley*, 7 Term, 452.

Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor, Evid. sect. 1513.

Other text-writers of high authority substantially concur in that view; as, for example, Mr. Greenleaf says that "the rule should apply only to that which was directly in issue, and not to every thing which was incidentally brought into controversy during the trial;" and the reason given for that limitation is worthy of notice, which is, that the evidence must correspond with the allegations, and be confined to the point in issue; and he remarks that it is only to the material allegations of one party that the other can be called to answer, for to such alone can testimony be regularly adduced, and upon such an issue only is judgment to be rendered. Pursuant to those suggestions, he states his conclusion as follows: "A record, therefore, is not held conclusive as to the truth of any allegations which were not material nor traversable, but as to things material and traversable it is conclusive and final."

Unless the court, in rendering the former judgment, was called upon to determine the merits, the judgment is never a complete bar; and it is safe to add, that, if the trial went off on a technical defect, or because the debt was not yet due, or because the court had not jurisdiction, or because of a temporary disability of the plaintiff or the like, the judgment will be no bar to a future action. 1 Greenl. Evid. sect. 330.

Since the resolution in *Ferrer's Case*, 6 Coke, 7, the general principle has always been conceded, that, when one is barred in any action, real or personal, by judgment or demurrer, confession or verdict, he is barred as to that or a similar action of the like nature for the same thing for ever. Demurrer for want of equity in such a case is allowed in chancery, because the whole matter in controversy is open in the first suit.

Contrary to that rule, a party brought a second bill of com-

plaint, and the Vice-Chancellor, in disposing of the case, expressed himself as follows: —

"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the party has, from negligence, omitted part of his case."

And he added that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Henderson* v. *Henderson*, 3 Hare, Ch. 115; *Bagot* v. *Williams*, 3 B. & C. 241; *Roberts* v. *Heine*, 27 Ala. 678; *Safford* v. *Clark*, 2 Bing. 382; *Miller* v. *Covert*, 1 Wend. 487.

When a fact has been once determined in the course of a judicial proceeding, say the Supreme Court of Massachusetts, and final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done; and they proceed to say that the estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps, or the groundwork upon which it must have been founded. *Burlen* v. *Shannon*, 99 Mass. 203; *Queen* v. *Hartington*, 4 El. & Bl. 794; *Gilbert* v. *Thompson*, 9 Cush. 849.

Extended explanations upon the subject of estoppel by a prior judgment were made by this court nearly twenty years ago, by a judge very competent to perform that duty. *Steam Packet Company* v. *Sickles*, 24 How. 342. Such a judgment, he said, in order that it may operate as an estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter between the same parties for the same purpose. He then proceeded to describe the cause of action in that case,

which, as he stated, was a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent; that the sum demanded was the complement of a whole, of which the sum demanded in the declaration in the former suit is the other part. Both declarations contained similar special counts; and the court remarked, that a decision in the one suit on those counts in favor of the plaintiffs necessarily included and virtually determined the sufficiency of the declaration to sustain the title of the plaintiffs, and showed that the record was admissible in evidence.

Different views were entertained by the defendants, and they submitted the proposition that a judgment was not admissible in evidence as an estoppel, unless the record showed that the very point it is sought to estop was distinctly presented by an issue, and that it was expressly found by the jury; but the court remarked, that such a rule would be impracticable, as it would restrict the operation of *res judicata* within too narrow bounds, and the court decided that it was not necessary as between parties and privies that the record should show that matter of the estoppel was directly in issue, "but only that the said matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury."

Attempt was made in that case to maintain the proposition that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise, and expressly overruled the proposition, although the defence of estoppel failed for other reasons.

Two notes, in another case, were given by the purchaser of a vessel to the vendor of the same, and payment of the first note being refused, the payee sued the maker; and the maker, at the trial, set up as a defence that the vessel was rotten and unseaworthy at the time of sale, and that those facts were known to the plaintiff. They went to trial, and the verdict and judgment were for the defendant. Subsequently the plaintiff sued

the other note, and the defendant set up the judgment in the other case as a bar to the suit; and the Supreme Court of New York sustained the defence, holding that the former judgment, whether pleaded as an estoppel or given in evidence under the general issue, was conclusive that the sale was fraudulent, and that the plaintiff could not recover in the second action. *Gardner* v. *Buckbee*, 3 Cow. 127.

Certain sums of money, in a later case, were paid by a surety on two bonds given by an importer, in which the plaintiff and defendant were sureties. They were jointly liable; but the plaintiff paid the whole amount, and brought suit against the other surety for contribution. Service was made; and the defendant appeared and set up the defence that he had been released, with the consent of the plaintiff, before the payment was made; and the court sustained the defence upon demurrer, and gave judgment for the defendant.

Moneys were also paid by the same surety to discharge the liability under the second bond. Contribution being refused, the plaintiff brought a second suit, and the defendant set up the former judgment as a bar; and the court sustained the defence, it appearing that both bonds were given at the same time upon the same consideration, and as part of one and the same transaction. *Bouchard* v. *Dias*, 3 Den. 243.

Neither of the second suits in the two preceding cases were for the same cause of action as the first, but the defence was sustained as in *Outram* v. *Morewood*, 3 East, 358, because the suit was founded upon the same title.

Cases of that kind are quite numerous, and they show to a demonstration that a judgment may be a bar if the same title is involved, even though the cause of action may be founded on a different instrument, or for a different trespass upon the same premises.

Conclusive support to that proposition is found in repeated decisions, of which the following are striking examples: *Burt* v. *Sternburgh*, 4 Cow. 563; *Whittaker* v. *Jackson*, 2 Hurlst. & Colt. 931; *Strutt* v. *Bovingdon*, 5 Esp. 59.

In order to make a judgment conclusive, it is not necessary, said Mr. Justice Bigelow, that the cause of action should be the same in the first suit as that in which the judgment is pleaded

or given in evidence, but it is essential that the issue should be the same. The judgment is then coextensive with the issue on which it is founded, and is conclusive only so far as the same fact or title is again in dispute. *Merriam* v. *Whittemore*, 5 Gray, 317.

Decided cases in that State to the same effect are numerous, the highest court of the State holding that it is well settled that a judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both; that the judgment is conclusive in relation to all matters in the suit which were put in issue, but has no effect upon questions not involved in the issue, and which were neither open to inquiry nor the subjects of litigation. *Norton* v. *Huxley*, 16 id. 290.

Damages were claimed by the plaintiff for the loss of his shop by fire communicated to it by the defendants' locomotive engine, and he recovered judgment for the injury. He subsequently brought a second suit, for the loss of his dwelling-house and shed by fire, it appearing that the house and shed took fire from the shop. Process being served, the defendants appeared and set up the former judgment as a bar. The court sustained the defence, holding that the plaintiff did not show any right to maintain another action merely by proving his omission to produce upon the trial all the evidence which was admissible in his behalf, and that having chosen to submit his case upon the evidence introduced, he was bound to abide by the verdict and judgment in the first suit. *Trask* v. *Railroad*, 2 Allen, 382.

Where a party took a bill of sale of property from the owner, and the same was subsequently attached by an officer at the suit of the creditors of the former owner, and the purchaser under the bill of sale having converted part of the property to his own use was sued by the officer, and the latter recovered judgment upon the ground that the bill of sale was fraudulent and void as to the creditors, it was held that the judgment was a bar to a subsequent suit of replevin commenced by the grantee in the bill of sale for the residue of the property in the hands of the officer. *Doty* v. *Brown*, 4 Comst. 75.

Beyond question, the bar is not defeated because the subject-

matter of the second suit is different from the first, if it be founded on the same title; and the Supreme Court of Pennsylvania have held, in accordance with that view, that a judgment in trespass upon a traverse of *liberum tenementum* estops the party against whom it has been rendered, and his privies, from afterward controverting the title to the same freehold in a subsequent action of trespass. *Stevens* v. *Hughes*, 31 Penn. St. 385; *Hatch* v. *Garza*, 22 Tex. 187; *Clark* v. *Sammons*, 12 Iowa, 370.

Tested by these several considerations, it is clear that a former judgment is a bar in all cases where the matters put in issue in the first suit were the same as the matters in issue in the second suit. *Ricardo* v. *Garcias*, 12 Cl. & Fin. 401; *Beloit* v. *Morgan*, 7 Wall. 623. "It results from these authorities that an adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title is the same, although the cause of action may be different." 2 Smith, Lead. Cas. (7th Am. ed.) 788, 789; Bigelow on Estoppel (2d ed.), 45; *Aurora City* v. *West*, 7 Wall. 96; *Outram* v. *Morewood*, 3 East, 346; *Gould* v. *Railroad Company*, 91 U. S. 526.

Grant that, and still it is suggested that the plaintiff in the suit on the coupons did not introduce evidence to prove that he paid value for the bonds with the coupons; but the answer to that is, that he might have done so. He alleged in the declaration that he paid value, and consequently he might have given evidence to prove it, which shows that the question was directly involved in the issue between the parties.

Doubtless the plaintiff neglected to give evidence in that behalf, for the reason that he and his counsel were of the opinion that the evidence introduced by the defendants was not sufficient to repel the *prima facie* presumption, arising from his possession of the instruments, that he paid value for the transfer, and I am still of that opinion; but the remedy of the plaintiff, if surprised, was to except to the ruling, or to submit a motion for new trial.

Suggestions of that sort are now too late, nor are they sufficient to modify the effect of the judgment. When once finally rendered, the judgment must be considered conclusive, else liti-

gation will be endless. Litigants sometimes prefer not to bring forward their whole case or defence, in order to enjoy the opportunity to bring up a reserve in case of defeat in the first contest; but a rule which would sanction that practice would be against public policy, as it would enable a party to protract the litigation as long as he could find means or credit to compel the attendance of witnesses and to secure the services of counsel.

JOHNSON v. HARMON.

1. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to that court.
2. As the verdict may or may not have been the ground for the decree, an appeal from the latter cannot be made to turn on the judge's rulings at the trial of the feigned issue, but must be decided upon the whole case, pleadings, evidence, and verdict, giving to the latter as much effect as it is worth.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Argued by *Mr. A. G. Riddle* for the appellant.

The court declined to hear *Mr. M. Thompson* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was a bill in equity, involving, amongst other questions, the validity of a trust deed given by the complainant (the appellee here) to secure certain notes. The complainant charges in his bill that he was so intoxicated when he executed the deed and notes as to be incapable of understanding what he was doing. The court below, after considerable testimony had been taken, directed an issue to try the question whether the complainant, at the time of the execution of the deed of trust and notes, was capable of executing a valid deed or contract. The issue so directed was tried, and resulted in a verdict for the complainant; namely, that he was not capable of executing a valid deed or contract. The defendants took a bill of exceptions to the charge given by the judge who tried the issue, which was allowed, and signed by him. The cause afterwards

came on to be heard upon the exceptions, and they were overruled. Subsequently a final hearing was had upon the pleadings, evidence, and verdict, and a decree was rendered for the complainant, directing the trust deed and notes in question to be vacated and set aside. From that decree this appeal was taken, and the only errors assigned are to the charge given by the judge to the jury on the trial of the feigned issue.

This is totally inadmissible. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to said court. 2 Dan. Ch. Pr. (3d Am. ed.) 1106; *Armstrong* v. *Armstrong*, 3 Myl. & K. 52; *Ex parte Story*, 12 Pet. 343. See the cases on new trials on feigned issues collected in 3 Graham & Waterman on New Trials, 1553, &c. The issue is directed to be tried for the purpose of informing the conscience of the Chancellor, and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the cause though dissatisfied with the verdict, and make a decree contrary thereto, if in his judgment the law and the evidence so requires. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause; for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide (as was done here) upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the whole case, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue.

Decree affirmed.

MR. JUSTICE CLIFFORD concurred in the judgment of the court, and delivered the following opinion: —

Difficulty attends the effort to define, with clearness and precision, what degree of mental unsoundness in a grantor is sufficient, in contemplation of law, to render him incapable of giving a valid and effectual deed of conveyance. Confirmed

insanity which deprives a person of mental capacity to distinguish between right and wrong, in respect to the act in question, renders the person irresponsible for such an act, though criminal, and disqualifies him to enter into a contract or to execute a valid instrument to convey real or personal estate.

Deeds made by such a person are at least voidable; but mere weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions in respect to the subject-matter of the contract.

Men of such understanding are held responsible for criminal acts, and they may make valid contracts; but when it appears that a contractor or grantor has not strength of mind and reason sufficient to understand the nature and consequences of his act in making a contract or in executing a deed, the instrument may be avoided, on the ground of the mental incapacity of the party to contract or to execute the conveyance.

Both minds must meet in such a transaction; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance. *Dennett* v. *Dennett*, 44 N. H. 535; 2 Kent, Com. (12th ed.) 45.

Enough appears to show that the complainant owned lot numbered twenty-six, described in the record, with the two dwelling-houses erected thereon; that on the 3d of February, 1871, he indorsed two notes of that date, each for the sum of three hundred dollars, payable one in five and the other in six months from date, with ten per cent interest, to the order of the first-named respondent; and that he, on the same day, executed and delivered to the other respondent a deed of conveyance of the houses and lot in trust to suffer and permit the complainant to occupy and enjoy the premises until some default made in the payment of those two promissory notes, with power in the trustee, in case of default of payment, to proceed, on the request of the payee of the notes, to sell the

premises. Default of payment of the first note was made, and complainant alleges, in his original bill of complaint, that the trustee threatens to sell the premises. Subsequently he, by leave of court, filed an amended bill of complaint.

Reference will only be made to the amended bill, as the matters in controversy arose out of charges contained in that pleading, which are as follows: That when the complainant executed the deed of trust and the notes he was so intoxicated that he did not know what he was doing; that he did not know that he was making his property liable for the notes, or that he was incurring any obligation to pay the notes; that the trustee, on the 21st of September last, sold the property at public auction to the payee of the notes, and that he claims the property as his own, and has given the complainant notice to leave the premises.

Based upon these allegations, and others not necessary to be reproduced, the complainant prays as follows: 1. That the sale to the payee of the notes may be annulled and set aside. 2. That the trustee may be enjoined and restrained from making any conveyance of the premises to any person. 3. That if the trustee has made any conveyance of the same, that the conveyance may be annulled and set aside. 4. That the deed of trust may be decreed null and void. 5. That the payee of the notes may be enjoined and restrained from taking possession, or in any way interfering with the premises or with the complainant, or any tenant thereof, in the free use and enjoyment of the property; and for general relief.

Process was issued; and the first-named respondent appeared and filed a separate answer, which consists of a denial of every allegation of the bill of complaint, together with two affirmative averments: 1. That the complainant several times asked for extension of time for the payment of the notes. 2. That he, the respondent, saw no signs of intoxication in the complainant at the time the notes and deed of trust were executed, and that he never set up any such pretence before the first note was sued.

Proofs were taken, and it appears that the cause was submitted to the court upon the pleadings and evidence without argument. Before decision, the court directed that a feigned

issue should be tried by a jury in the law court of the District, as follows, to wit: whether or not the complainant at the time the deed of trust and notes were executed was capable of executing a valid deed or contract.

Pending that proceeding, the complainant filed in the equity court a supplemental bill, in which he alleged that the jury empanelled to try the feigned issue failed to agree, and that the issue was still pending in the law court; that the payee of the notes brought suit against him before a justice of the peace to obtain possession of the premises; that he recovered judgment in the case, and that the present complainant appealed the same to the Supreme Court of the District; that the appellee in that suit, notwithstanding the pendency of the feigned issue in the court of law, caused the appeal from the judgment rendered by the justice of the peace to be docketed and affirmed, without evidence or inquiry into the merits. Wherefore he prayed that the writ of possession might be annulled and set aside, and for an injunction.

Instead of that, the court first issued a summons commanding the respondents to appear and answer the allegations of the supplemental bill. Service being made, the first-named respondent appeared and filed an answer, in which he admits that the complainant did set up the defence of intoxication in the suit on the note; that he, the present respondent, did obtain judgment for possession; but he avers that the appeal was never perfected, and that the judgment of the justice of the peace was affirmed. Hearing was had; and the court awarded an injunction restraining the respondent from interfering with the property, but requiring the complainant to give bond to pay rent, in case the final decree should be in favor of the respondent.

Those matters being adjusted, the parties went to trial upon the feigned issue in the court of law, and the jury found that the complainant at the time he signed the deed of trust and notes was not capable of executing a valid deed or contract. Exceptions were filed by the respondent as in a common-law action, in which is given what purports to be the testimony introduced in the trial of the issue.

Evidence was offered by the plaintiff tending to prove that at and after the time of the making of the deed and notes, he,

the plaintiff, was in the habit of using intoxicating liquors to excess; that he was more or less under such stimulants all the time; that at the date of the deed he had been drinking freely; and the bill of exceptions shows that several witnesses testified that they did not consider him fit to do business. Among others, the makers of the notes secured by the deed of trust were called, and they testified that they were present at the making of the deed and notes; that the complainant was very much intoxicated, so much so that they did not consider him fit to transact business or capable of executing a deed or contract. Testimony to the same effect was given by another witness who was also present when the deed and notes were executed.

Support to that theory, of a decided character, was also derived from the testimony of a physician, who testified that he saw the party almost daily about that time, and "that he was not competent to contract at the time of making the deed," in which statements he was confirmed by other witnesses called during the trial.

Opposing evidence was introduced by the defendant. In the first place, he called the trustee who prepared the deed and notes, and he testified that the parties, including the makers of the notes, came to his office to have the deed prepared; that he informed him that he must have the title-deed of the plaintiff to obtain the description of the premises; that the plaintiff and the payee of the notes left his office for that purpose, and returned with the title-deed; that he prepared the trust-deed, read it over to the plaintiff, and explained it to him; that he expressed himself satisfied with it, and signed it. He also called the magistrate who took the acknowledgment of the grantor; and both of these witnesses testified that they thought that the grantor was sober. Witnesses were also examined by the defendant, whose testimony tended to prove that the plaintiff said nothing of the deed being invalid because of his intoxication before the property was sold, and that he signed a paper six weeks afterwards, agreeing to the assignment of the lease for which the notes secured by the deed of trust were given.

Three exceptions were taken by the defendant to rulings of the presiding justice in refusing to instruct the jury as requested,

as follows: 1. That, to set aside a deed or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of his reason and understanding. 2. That the jury must find for the defendants, unless they believe that the plaintiff was in such a state of intoxication as not to know what he was doing when he signed the deed in controversy. 3. That, if the jury believe from the evidence that the plaintiff knew that he was signing a deed of trust upon his property, they must find for the defendant.

By the record, it appears that the judge held that if the word "utterly" in the first prayer as here reported was intended to express an entire loss of reason in all respects, it was not good law; but if it meant that the defendant must be incapable of understanding the terms and conditions of the deed of trust, in order to avoid it, then it was good law; and, so modified, the instruction was given to the jury. That the other two requests were granted subject to the following modification: that it was not sufficient to make the deed a valid one for the plaintiff to know that he was signing a deed of trust on his property; but he must have been in such a condition of mind as to be able to know and understand the terms and condition of the deed. That it is not necessary, in order to render the deed of the plaintiff invalid, that, at the time of its execution and acknowledgment, he was entirely demented by intoxicating drink; but his act will be rendered invalid if he was in such a condition of mind that he could not comprehend what were the terms and condition of the instrument.

Subsequently the parties were heard on the exceptions in the equity court, and the exceptions were overruled. Neither party moving for a rehearing or a new trial, the cause came up for consideration in the Supreme Court of the District, and the court affirmed the decree of the Chancellor, overruling the exceptions of the defendant to the rulings of the justice presiding at the trial before the jury.

All interlocutory matters having been disposed of, the cause came on to be heard upon the original bill, the amended and supplemental bills, the answers of the respondent, the verdict

of the jury, the decree in general term overruling the exceptions to the ruling of the justice in the trial of the feigned issue; and, upon consideration thereof, it is ordered, adjudged, and decreed that the deed of trust and the indorsements of the complainant on the notes are hereby vacated, annulled, and set aside, and for the other relief, as more fully set forth in the interlocutory decree exhibited in the record, which was in all things affirmed by the final decree of the Supreme Court of the District, from which the respondent appealed to this court.

Erroneous rulings of the judge presiding in the trial of feigned issues are the proper subject of a motion for new trial before the Chancellor who formed the issues and sent them to the law court for trial, but they do not of themselves constitute a ground of appeal to this court. Appeals here can only be sustained where the decree is final, and such an appeal brings up the whole case. Where exceptions are taken on the trial of an issue out of chancery, and made part of the record, the certificate to the verdict by the court of law is a certificate to the whole record, and the exceptions, though not expressly certified, become a part of the chancery record. 2 Dan. Ch. Pr. (4th Am. ed.) 1120; *Watkins* v. *Carlton*, 10 Leigh, 560.

Issues of the kind are directed to be had at law, to inform the conscience of the Chancellor as to doubtful facts in controversy. *Harding* v. *Handy*, 11 Wheat. 125; *Goodyear* v. *Rubber Company*, 2 Cliff. 351.

Power to grant a new trial of the issues is unquestionably vested in the Chancellor; but, in determining that matter, the practice is to consider the whole of the evidence given at or before the trial and what has since become known to the court; and the rule is, that if the court is satisfied that full and complete justice has been done between the parties, the motion for new trial will be denied. 2 Dan. Ch. Pr. 1121; *Patterson* v. *Ackerson*, 1 Edw. Ch. 102.

Applications for new trial in an issue sent out of chancery must be made to the court of chancery, after the proceedings are certified back from the court of law. 1 Barb. Ch. Pr. (2d ed.) 456; *Van Alst* v. *Hunter*, 5 Johns. Ch. 153; *Birdsall* v. *Patterson*, 51 N. Y. 43.

Such an issue is directed, as before remarked, to inform the

conscience of the Chancery Court, and the application for new trial must be made to the Chancellor; nor will the Chancellor grant a new trial for every error of the judge presiding at the trial of the issues, if, on the whole facts, he is satisfied that the result is correct. *Apthorp* v. *Comstock*, 2 Paige, 486–488; *Silsby* v. *Foote*, 20 How. 385; *Clayton* v. *Garrington*, 33 Barb. 145.

Instructions given in the trial of such an issue are not the proper subject of appeal to this court, the rule being that this court can only examine the final decrees of the equity court. *Brockett* v. *Brockett*, 3 How. 691; *McLaughlan* v. *Bank*, 7 id. 227.

Suppose that is so, still it is insisted by the appellant that the evidence reported in the record is sufficient to show that the final decree of the court below is erroneous.

Imbecility of mind is not of itself sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life. Weakness of understanding may be a material circumstance in every case where the charge is that one of the contracting parties has taken undue advantage of the other, or has been guilty of unfair practice or imposition. Formerly, it was considered that intoxication was no excuse for the non-fulfilment of a pecuniary liability, and that it constituted no sufficient plea in avoidance of a contract; but it is now settled, says Chancellor Kent, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is at least voidable. 2 Kent, Com. (12th ed.) 451.

Much consideration was given to that question in the case of *Barret* v. *Burton*, 2 Aik. (Vt.) 167, and it was there decided that an obligation executed by a man deprived of the exercise of his understanding, by intoxication, was voidable by himself, though the intoxication was voluntary and not procured by the circumvention of the other party. *Young* v. *Stevens*, 48 N. H. 136.

Other courts and text-writers of the highest authority adopt

that view, and support the proposition without qualification, except where the contract was for necessaries, or where the intoxicated party keeps the goods and uses the same as his own property after he becomes sober. It appears to have been at one time considered, says Chitty, that an agreement was not void even in equity, although it was entered into by the party charged thereon while he was in a state of absolute intoxication, unless such intoxication had been occasioned by the contrivance of the other party, or some positive fraud had been practised; but it would seem, says the author, that, on principle, such a degree of intoxication as entirely deprives a party of the use of his reason must avoid an engagement entered into by him while in that state, even although it was produced by his own folly, and although no actual fraud was intended or practised; giving the same reason for the conclusion given at a much earlier period, that "such a person had no agreeing mind," which of itself is sufficient to show that the intoxicated man cannot be held bound to the alleged contract. Chitty on Contr. (10th ed.) 137; *Pitt* v. *Smith*, 3 Camp. 33; *Fenton* v. *Holloway*, 1 Stark. 126.

Beyond doubt, these authorities support the proposition advanced; and the same writer adds, that it is now settled that where a party, when he enters into a contract, is in such a state of intoxication as not to know what he is doing, and particularly when it appears that this was known to the other party, his contract is at least voidable. *Matthews* v. *Baxter*, Law Rep. 8 Exch. 132; *Molton* v. *Camroux*, 2 Exch. 501.

When intoxication goes so far as absolutely to destroy the reason, it is evident that it renders the person in that state incapable of contracting so long as it continues, since it renders him incapable of giving consent. 1 Poth. on Obl., by Evans, p. 29.

Modern text-writers treat of contracts with intoxicated persons under a distinct head; and Addison says, that a party who makes a contract in such a state of intoxication as not to know what he is doing, cannot be compelled to perform the contract by the other party who knew him to be in that state, and that a man who takes an obligation from another so circumstanced is guilty of actual fraud. Examples are given which support

the proposition; but the author holds that a contract made by a man in a state of intoxication is voidable only and not void, and therefore the intoxicated man may, if he pleases, when he becomes sober, ratify it, and that it will then be binding Addison on Contr. (3d Am. ed.) 285.

Courts of justice in repeated instances have decided in the same way. Reference will be made to a few such cases, with the remark, that the number might be greatly increased.

Undoubtedly, said the Supreme Court of Pennsylvania, the total drunkenness of the maker of a note when he executed it, if known to the payee, rendered it void as to the latter; and they remark, that the old rule that a man should be held liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, has been long since exploded, and that it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void as between the parties. *Bank* v. *McCoy*, 69 Penn. St. 207.

Except where the contract is for necessaries, the Court of Exchequer held, that where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, as in consequence of intoxication, in such a case there can be no binding contract. Parke, B., said, where the party, when he entered into the contract, was in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it; adding, that a person who takes an obligation from another under such circumstances is guilty of actual fraud. *Gore* v. *Gibson*, 13 M. & W. 625.

In regard to drunkenness, says Greenleaf, it is now settled that incapacity from that cause is a valid defence to an action upon the contract made while under its influence, as well where it was voluntary and by the fault of the defendant as where it was caused by the fraud or procurement of the plaintiff. 2 Greenl. Evid. (12th ed.) sect. 374.

Whether the intoxication was so great as to suspend or destroy the power of intelligent assent, is a question of fact. Nor does it make any difference that the drunkenness was voluntary and wilful, for the legal theory is, that, without the capacity of giving a deliberate assent, no contract can be made. Story on Contr. (5th ed.) 86. But the author adds, that intoxication only renders the contract voidable, not void; so that the party intoxicated may, upon recovering his understanding, adopt it, when it will become obligatory. *Reinskopf* v. *Rugge*, 37 Ind. 207.

Contracts of the kind are voidable only, not void, and therefore capable of being ratified when the party becomes sober. *Molton* v. *Camroux*, 2 Exch. 501; *Matthews* v. *Baxter*, Law Rep. 8 Exch. 132.

Apply these rules to the facts of the case as disclosed by the proofs, and it is clear that there is no error in the record.

BEALL v. WHITE.

1. Under the act of Congress approved Feb. 22, 1867 (14 Stat. 403), the lien of a landlord for rent has priority over a deed of trust made by his tenant after the commencement of the tenancy, whether the chattels covered by the deed were, when it was executed, upon the demised premises, or were subsequently acquired and placed by the tenant upon them.
2. A statutory lien attaching to personal chattels, although no possession of them be delivered, has the same operation and efficacy as existed at common law, where the possession accompanied and followed the deed creating the lien.
3. It is only where no rule of law is infringed, and the rights of third persons are not prejudiced, that courts of equity will, in certain cases, give effect to mortgages of subsequently acquired property.
4. A surrender to a landlord is effected either by words manifesting the intention of the lessee to yield up his estate, or by operation of law, where the parties, without such words, do some act which implies that they both agree to consider the surrender as made.
5. In this case, the court holds that there was no surrender, either express or by operation of law.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Walter D. Davidge, for the appellants.

Mr. Enoch Totten, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Landlords leasing real property in this District have a tacit lien upon such of the personal chattels of the tenant upon the premises as are subject to execution for debt, commencing with the tenancy, and continuing for three months after the rent is due, and until the termination of any action for such rent brought within said three months. 14 Stat. 404; *Fowler* v. *Rapley*, 15 Wall. 328; *Webb* v. *Sharp*, 18 id. 14.

Sufficient appears to show that the executors of Alpheus Middleton, deceased, and Benjamin Beall, the owner of the other undivided half, on the 5th of March, 1867, leased the hotel at the corner of Pennsylvania Avenue and Sixth Street West, then known as the Clarendon Hotel, to George W. Bunker and William H. Crosby, for the term of five years from the first day of April next ensuing, at the yearly rent of $4,000, payable in monthly instalments the last day of each month, with the proviso, that if the rent, or any part thereof, shall be in arrear and unpaid for the space of thirty days, the tenancy, upon notice thereof being given in writing to the lessees, shall cease and determine, and the same shall be and become a tenancy at will, determinable as prescribed in the act of Congress.

Covenants were also contained in the lease by both parties. On the part of the lessees, for the payment of rent during the term and in the mode prescribed; that they would not let or sublet the demised premises without the written consent of the lessors; and for the peaceful surrender of the premises at the end of the term or additional term. Reciprocal covenants were also made by the lessors for quiet enjoyment, for the renewal of the lease for another term of five years, if the lessees made written application for the same within the period therein specified.

Under that instrument the lessees entered into possession of the premises, purchased necessary furniture, and commenced the business of hotel-keeping, the name of the house being changed to Bunker's Avenue Hotel. At the date of the lease, Thomas M. Plowman was a silent partner with the lessees in the business; and it appears that Crosby, on the 2d of October in the following year, sold and assigned his interest

in the lease and furniture to Bunker and Plowman, his co-partners.

Negotiations took place for the enlargement of the hotel; and, in December following, an adjoining tenement belonging to Benjamin Beall, in his own right, was leased to Bunker & Plowman, at the yearly rent of $1,300, payable monthly, the same having previously been altered and remodelled for the purpose at great expense, and was then fitted up with the necessary furniture.

Five days after the commencement of the lease, to wit, April 6, in the same year, the lessees gave a deed of trust upon all the furniture then in the hotel to Orestes B. Dodge, trustee, to secure two notes of even date with the deed, each for $1,250, payable in nine and twelve months. When William H. Crosby sold and assigned his interest, Bunker & Plowman on the same day, to wit, Oct. 2, in the same year, gave a deed of trust to Samuel L. Phillips, trustee, upon all the furniture then in the hotel and all additions to the same, and all furniture to be placed in the Beall tenement, then being remodelled, and also upon the demised term and any further term the grantors may obtain in the Beall property, to secure two notes of even date, each for the sum of $3,500, payable in six and twelve months, in favor of William H. Crosby, for his interest in the lease and furniture.

Bunker & Plowman, on the 17th of April following, conveyed all their leasehold interest in the tenements, then called the St. James Hotel, together with all the furniture therein, to Samuel L. Phillips, trustee, to secure a continuing credit given by Beall & Baker to the grantors, in the amount of $5,000, to continue for two years. On the 20th of December in the same year the same grantors gave another deed of trust to Elias E. White, trustee, to secure a further indebtedness to Beall & Baker, in the sum of $3,044.77, as appears by the answer.

Two of the notes secured by the deeds of trust, each payable in twelve months, are claimed by the Freedman's Savings and Trust Company, one being secured in the first trust-deed and the other in the second, both notes having been taken by the bank when overdue. Mention should also be made that the

same grantors, on the 10th of April, two years later, assigned their leasehold interest and all the furniture in the hotel to John Spicer, and, late in the same month, put him in possession, the original lessors refusing to recognize him as tenant. Rent was subsequently paid, but was received and receipted as due from Bunker & Plowman.

Suits in attachment on two of the notes were brought for rent, on the 29th of August in the same year, and two other similar suits were instituted for similar causes, near the close of the year, in which chattels upon the premises, including both tenements, were seized, and judgments of condemnation were duly rendered.

Enough appears to show that Bunker & Plowman were indebted to Beall & Baker, under the deeds of trust executed for their benefit, in the sum of $10,000, and that it was at their instance that the trustees proceeded to enforce the deeds; that the property was sold by the trustees, under the several deeds of trust, with the consent of Spicer; and that the trustees then filed their bill of interpleader against Beall and Beall & Baker, and the Freedman's Savings and Trust Company, for the distribution of the fund.

Process was served, and the respondents appeared and filed an answer. Proofs were taken, the parties heard, and the court entered a decree that the deeds of trust are entitled to priority of satisfaction out of the fund in the hands of the complainants as against the rents to the landlord. Such being the final decree in the Court of Appeal, Beall & Baker, by special leave, appealed to this court, and assign for error the decree of the court below, adjudging that the deeds of trust are entitled to priority of payment as against the lien of the landlord.

Priority in favor of the first deed of trust cannot be claimed, unless the proposition of appellees can be sustained, that the first tenancy ended when William H. Crosby, with the consent of the lessors, sold and assigned his interest in the lease and furniture to Bunker & Plowman, or when the latter in turn assigned their leasehold interest in the demised premises and the furniture in the hotel to John Spicer. Suppose the original tenancy was unaffected by those events, it follows that the claim

in favor of the first deed of trust is unfounded, as the record shows that the tenancy commenced before the deed was executed, and the recitals in the deeds showed that the chattels were upon the premises.

Without more, these remarks are sufficient to show that the court below erred in that regard, if the original contract of lease continued in force unaffected by the described assignments. Grant that, and it follows that the decree under review is also erroneous in respect to the claim made in favor of the other deed of trust, for the same reason, that the tenancy commenced eighteen months before the deed was executed. Nor can the appellees derive any benefit from the fact that the deed purports also to convey chattels to be acquired in the future and placed in the hotel. Liens of the kind, arising under the act of Congress, attach at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought on to the premises. Statutory liens have, without possession, the same operation and efficacy that existed in common-law liens where the possession was delivered. Personal chattels on the premises, sold in the ordinary course of trade, without knowledge of the lien, are not subject to its operation, or, in other words, the lien in respect to such sales, where the goods are removed from the premises, is displaced, and the purchaser takes a perfect title to the property discharged of the lien. *Webb* v. *Marshall*, 13 Wall. 15; *Grant* v. *Whitwell*, 9 Iowa, 153; *Doane* v. *Garretson*, 24 id. 351; *Marr* v. *Sheffner*, 2 East, 523; *Burton* v. *Smith*, 13 Pet. 488; *Fowler* v. *Rapley*, 15 Wall. 336.

Beyond question, the remarks made are sufficient to show that the lien of the landlord, so far as respects the chattels on the premises, is entitled to priority over the deeds of trust, unless the proposition of the appellees, that the statutory lien was displaced by one or both of the subsequent assignments by the lessees.

Before examining that question, it is proper to consider to what extent, if at all, the rights of the parties are affected by the terms of the second deed of trust, which purports to convey property subsequently acquired by the grantors and placed on the demised premises. Courts of equity will, in certain cases,

give effect to a mortgage of property to be acquired subsequently, where no rule of law is infringed and the rights of third persons are not prejudiced. *Pennock* v. *Coe*, 23 How. 12.

Grants or conveyances of the kind may, in certain cases, be valid, subject to those conditions, or, to speak more accurately, the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced. Story, Eq. Jur. (9th ed.) § 1040; *Dunham* v. *Railway Company*, 1 Wall. 254; *United States* v. *New Orleans Railroad*, 12 id. 362.

Decided cases may be found where the rule, as stated in the preceding citations, is greatly qualified, and others where it is expressly denied, if applied in the ordinary business transactions. *Otis* v. *Sill*, 9 Barb. 111; *Mogg* v. *Baker*, 3 M. & W. 198; *Winslow* v. *Insurance Company*, 4 Met. 316; *Jones* v. *Richardson*, 10 id. 481; *Lunt* v. *Thornton*, 1 Man., Gr. & Sc. 385.

Were it necessary to reconcile the decisions upon the subject, the effort would be involved in difficulty; but it is not necessary to make the attempt in this case, as the court is unhesitatingly of the opinion that the deeds of trust in that regard present no legal obstacle to the claim of the appellants.

Repeated decisions have settled the rule that the lien of the landlord attaches at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are placed on the demised premises. *Fowler* v. *Rapley*, 15 Wall. 328; *Webb* v. *Sharp*, 13 id. 14.

Decided cases everywhere admit that rule; and yet the second deed of trust in question provided that the grantee should take not only all the chattels on the premises at the date of the instrument, but also all such as the tenants might have on the premises in substitution, renewal, or addition to those contained therein, and all they might have during the continuance of the term in and about the addition which was then erecting to the hotel, and which was not leased to the tenants in possession under the lease until the month of December, 1868, as appears both by the bill of complaint and the answer. Suffice it to say

that the terms of the deed of trust are in that regard utterly inconsistent with the statutory rights of the landlord, and must give place to the superior claim of the appellants.

Concede all that, and still it is insisted by the appellees that the statutory lien for rent has been lost, because it was not seasonably enforced; and they assign two reasons for the conclusion: 1. That the first term ended and the second began when William H. Crosby retired and Plowman was substituted in his place, with the consent of the lessors. 2. That the second term ended when Bunker & Plowman in their turn left the premises, and that the third term commenced when Spicer, with the approbation of the lessors, entered into possession of the hotel and became its proprietor.

Changes of the kind were made; and the appellees submit the proposition that each one of the same effected by operation of law a surrender of the previous term, and created both a new tenancy and a new term. Two things which are unlike should be separately considered; and for that reason the alleged surrenders of the term will be separately examined.

Both the pleadings and evidence show that Plowman, though not named in the original lease, was, in fact, a silent partner, and that he was interested in the contract; and the evidence also shows that the arrangement that Crosby should retire and that Plowman should take his place was a matter which the parties adjusted between themselves, doubtless with the consent of the senior partner named in the lease. All three were originally interested, each having a third interest; and the reasonable inference from the evidence is, that the other two, when Crosby retired, became joint owners of the entire interest conveyed by the lease. Evidence to show that the lessors, other than Benjamin Beall, were ever consulted is entirely wanting; and there is neither fact nor circumstance in the case to show that the parties, or any one of them, ever for a moment supposed that the term was surrendered, or that a new term was created by the transaction. *Whitney* v. *Myers*, 1 Duer, 266.

No new writings were executed, nor was any change made in the management of the property, except that one party interested retired, and another, who had an equal interest in the adventure, joined with the senior partner in conducting the

business, and contributed his proportion of the means to pay the past and accruing rent. 1 Washb. Real Prop. (4th ed.) 549.

Rent was subsequently paid by the tenant in possession; but there is no evidence in the case which has the least tendency to show that there was any surrender in fact of the term, or that any one of the parties ever had any such intention. *Lyon* v. *Reed*, 13 M. & W. 285. Indeed, it is not even suggested that there was any surrender in fact.

What the appellees suggest is, that these acts of the parties, proved, constitute a surrender by operation of law, even though such was not their intention. Such a conclusion may, in certain cases, arise by operation of law, as where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist.

Text-writers agree that a surrender is the yielding up the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words, by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, when the parties without express surrender do some act which implies that they have both agreed to consider the surrender as made. Taylor on Land. & Ten. (6th ed.) 392; Woodfall on Land. & Ten. (9th ed.) 267.

Decided cases to the same effect are very numerous, and they show that the evidence in this case is not sufficient to warrant the conclusion that there was any surrender of the term when Crosby retired and Plowman took his place. *Schieffelen* v. *Carpenter*, 15 Wend. 404; *Field* v. *Mills*, 33 N. J. 259; *Boardman* v. *Wilson*, Law Rep. 4 C. B. 57; *Bedford* v. *Terhune*, 30 N. Y. 458.

Attempt is next made to maintain the proposition that the term under the original lease terminated when Bunker and Plowman assigned or agreed to assign all their interest in the lease and furniture of the hotel to John Spicer, as alleged in the answer.

Satisfactory proof is exhibited that they agreed to make the

assignment, and it is certain that he went into possession of the premises as proprietor; and the theory of the appellees is, that Benjamin Beall assented to the transfer of the lease and the personal chattels, and that he agreed to accept the assignee as tenant of the demised premises. Testimony to that effect was given by several witnesses examined by the appellees, as exhibited in the record.

Opposed to that is the testimony of Benjamin Beall, who was called and examined in behalf of the appellants. He testifies that he never consented to the substitution. Instead of that, his testimony is that he peremptorily refused to recognize Spicer as tenant when he called upon him and made request to that effect; that the interview was before any assignment had been completed with the tenants in possession, and that he then informed Spicer that he would give him the benefit of an extension of the lease.

Full proof is also exhibited in the record that the owners of the hotel and furniture, on the 28th of April, 1871, gave written notice to the lessees in possession that they would, on the following day, take possession of the furniture and fixtures of the hotel, and that the marshal had been directed to attach the same. From that notice it also appears that they referred to a statement in a morning paper, that the hotel had changed hands, and stated that the change was not authorized by them, and that they would not sanction any such arrangement.

Nothing is wanted to show that the lessees knew that the acting lessor would not consent to any surrender of the term. Rent, it is admitted, was subsequently paid to him by Spicer; but the evidence shows that he receipted for it to the lessees who made the assignment, but without his consent. *Amory* v. *Kannoffsky*, 117 Mass. 354.

Taken as a whole, the evidence satisfies the court that there was no actual surrender of the term, and that the acts of the lessors, when properly understood, do not tend to prove the theory of the appellees, that there was any surrender by operation of law, within the meaning of that phrase as expounded by the decided cases. *Phené* v. *Popplewall*, 12 C. B. N. S. 334.

Evidence to support such a theory, so far as respects all of

the owners of the property and furniture, except one, is entirely wanting, as no application was ever made to any other one of the owners to give their consent to the arrangement, nor was any evidence introduced to show that they had knowledge that any thing of the kind was proposed.

Sufficient appears to show not only that Beall knew what the proposal was, but that he also knew what the parties, as between themselves, carried into effect. Much conflict exists in the evidence as to whether he consented to it or not; but, in view of the written notice given to the lessees before the change of proprietors was carried into effect, the better opinion is, that the change was made without having secured his consent.

Decree reversed, and cause remanded with directions to enter a decree, adjudging that the liens of the landlord have priority over the deeds of trust.

McCready v. Virginia.

1. Subject to the paramount right of navigation, the regulation of which in relation to foreign and inter-state commerce has been granted to the United States, each State owns the beds of all tide-waters within its jurisdiction, and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed.
2. The right which the citizens of the State thus acquire is a property right, and not a mere privilege or immunity of citizenship.
3. The second section of the fourth article of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," does not vest the citizens of one State with any interest in the common property of the citizens of another State.
4. A law of Virginia, by which only such persons as are not citizens of that State are prohibited from planting oysters in the soil covered by her tide-waters, is neither a regulation of commerce nor a violation of any privilege or immunity of inter-state citizenship.

Error to the Supreme Court of Appeals of the State of Virginia.

McCready, a citizen of Maryland, was indicted, convicted, and fined $500, in the Circuit Court of Gloucester County, Va., for planting oysters in Ware River, a stream in which the tide

ebbs and flows, in violation of sect. 22 of the act of the assembly of Virginia approved April 18, 1874, c. 214, p. 243, Sess. Acts 1874. That section is as follows: —

"If any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit $500, and the vessel, tackle, and appurtenances."

The Supreme Court of Appeals of the State affirmed the judgment below; whereupon the defendant sued out this writ of error.

Mr. Robert Ould for the plaintiff in error.

I. The legislation of Virginia is in violation of the second section of the fourth article of the Federal Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

1. Both at common law and under the statute, Virginia holds the beds of its navigable waters in trust for the common benefit of all its people or citizens.

2. Such beds being so held, the rights of the citizens of Virginia, which spring from citizenship, inure, by force of the Federal Constitution, to the benefit of the citizens of other States, even against a limitation in the State statute. Such limitation is void, because in derogation of Virginia's compact found in the supreme law. The Constitution, acting upon the grant in the State law in favor of the citizens of Virginia, and securing the same benefit to citizens of other States, nullifies the restriction in that law.

3. The State can fully and effectually regulate the use of its fisheries, and apply its police power to their management; but all such regulations must be in subordination to the Federal Constitution, and should apply to its own citizens as well as to those of other States.

4. The law as to shell-fish, so far as the right to use or appropriate them is concerned, is the same as that which applies to floating fish.

5. The right to plant oysters is distinct from the right to take or catch, and even if the constitutional provision does not

secure the latter, it does secure the former, to the citizens of other States, as no abstraction of any property held by the State is involved therein.

6. The State holds its different kinds of property in different rights. It has its private property, which it can control as fully as the private citizen can his. It also has its public property, which its citizens and those of other States can use and enjoy but not appropriate, such as its public buildings and grounds. It also holds a third class of property, such as its floating and embedded fish, as to which there can be no use or enjoyment except in appropriation; and when the right of user by appropriation is given by the State to its own citizens, the Federal Constitution secures the same right to the citizens of the other States.

7. The constitutional provision applies to tangible property as well as to incorporal privileges, where the right to use or appropriate tangible property held by the State is conferred upon all its citizens.

8. If the right of planting oysters, when it is given to the citizens of a State, is not secured to the citizens of other States, by the word "privilege" in the Federal Constitution, any punishment for planting them is excluded by the word "immunity."

The authorities for these positions are: *Paul* v. *Virginia*, 8 Wall. 180; *Ward* v. *Maryland*, 12 id. 418; *Slaughter-House Cases*, 16 id. 36; *Moody* v. *Arnold*, 1 Halst. 1; *Martin* v. *Waddell*, 16 Pet. 410; *Smith* v. *State of Maryland*, 18 How. 71; *Den* v. *Jersey County*, 15 id. 432; *Pollard's Lessee* v. *Hagan*, 3 id. 212; *Somerset* v. *Fogwell*, 5 Barn. & Cress. 883; *Bagot* v. *Orr*, 2 Bos. & Pull. 472; *Watson* v. *Sampson*, 8 Cush. 347; *Lakeman* v. *Burnham*, 7 Gray, 437; *Peck* v. *Lockwood*, 5 Day, 22; *Preble* v. *Brown*, 47 Me. 286; *Smith* v. *Levinus*, 8 N. Y. 472; *Home* v. *Richards*, 4 Cal. 441; 2 Black. Com. 39; *Chapman* v. *Miller*, 2 Speers, 783; *Wiley* v. *Parmer*, 14 Ala. 647; *Crandall* v. *State*, 10 Conn. 343; *Campbell* v. *Morris*, 3 Harr. & McH. 553, 554; *Commonwealth* v. *Milton*, 12 B. Mon. 219; Cooley's Story, sects. 1930, 1934, 1937.

II. The legislation is in conflict with the third clause of the eighth section of the first article of the Federal Constitution,

which confers on Congress the power "to regulate commerce with foreign nations and among the several States."

The law of Virginia applies as well to oysters brought from a sister State as to those bought in Virginia and planted there. As to such foreign oysters, at least, it is in conflict with existing commercial regulations, and also with the laws of the United States relating to the coast trade. Those laws give to all citizens of the United States the same rights of traffic and intercourse. A statute which prevents a citizen of Maryland from devoting property to such uses in Virginia as any Virginian can devote similar property to is a regulation of commerce, whether the property be brought from Maryland or purchased in Virginia. A citizen of Virginia can purchase a cargo of oysters in Maryland or in Virginia and plant them in the waters of Virginia. A citizen of Maryland, if he purchases a cargo of oysters in Maryland or in Virginia, cannot plant them in the waters of Virginia. Here is not only inequality, but an interference with the exclusive commercial authority of Congress. Cooley's Story on the Const., vol. ii. pp. 2–23; *Welton* v. *The State of Missouri*, 91 U. S. 275.

Mr. R. T. Daniel, Attorney-General of Virginia, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.

The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Smith* v. *Maryland*, 18 How. 74; *Mumford* v. *Wardwell*, 6 Wall. 436; *Weber* v. *Harbor Commissioners*, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell*, 16 Pet. 410. The title thus

held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

By art. 4, sect. 2, of the Constitution, the citizens of each State are "entitled to all privileges and immunities of citizens in the several States." Mr. Justice Washington, in *Corfield* v. *Coryell*, 4 Wash. C. C. 380, thought that this provision extended only to such privileges and immunities as are "in their nature fundamental; which belong of right to the citizens of all free governments." And Mr. Justice Curtis, in *Scott* v. *Sandford*, 19 How. 580, described them as such "as belonged to general citizenship." But usually, when this provision of the Constitution has been under consideration, the courts have manifested the disposition, which this court did in *Conner* v. *Elliott*, 18 How. 593, not to attempt to define the words, but "rather to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein." This clearly is the safer course to pursue, when, to use the language of Mr. Justice Curtis, in *Conner* v. *Elliott*, "we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief."

Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by

law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

Neither do we think this case is at all affected by the clause of the Constitution which confers power on Congress to regulate commerce. Art. 1, sect. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of

the State. In this way the people of Virginia may be enabled to produce what the people of the other States cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them.

We are unable to agree with the counsel for the plaintiff in error in his argument, that the right of planting may be enforced as a privilege of inter-state citizenship, even though that of taking cannot. Planting means, in "oysterman's phraseology," as counsel say, "depositing with the intent that the oysters shall remain until they are fattened." The object is, therefore, to make use of the soil and the water above it for the improvement and growth of that which is planted. It is this use, as has already been seen, that the State has the right, by reason of its ownership, to prohibit. *Judgment affirmed.*

CHORPENNING v. UNITED STATES.

From the repeal of the joint resolution of April 15, 1870 (16 Stat. 673), authorizing the Postmaster-General to adjust the accounts of George Chorpenning, and from the prohibition in the act of March 3, 1871 (id. 519), directing that no part of the money thereby appropriated for the use of the Post-office Department shall "be applied to the payment of what is known as the Chorpenning claim," the implication is clear, that nothing more was to be paid to him on account of said claim, without further authority from Congress.

APPEAL from the Court of Claims.

Mr. Joseph Casey for the appellant.

Mr. Solicitor-General Phillips, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellant rests his claim upon the act of Congress of March 3, 1857, 11 Stat. 521, and the resolution of Congress of July 15, 1870, 16 Stat. 673.

Under the act of 1857, Postmaster-General Brown, on the 25th of May and the 30th of June, 1857, awarded to the claimant three several sums of $30,000, $49,842, and $29,590.95, which were paid to him. He received them under protest.

Thereafter he filed his petition in the Court of Claims, aver-

ring that he was entitled to further compensation and damages under the act.

The Court of Claims held that the action of the Postmaster-General, and the payment and receipt of the sums awarded, were final and conclusive between the parties, and the petition was dismissed. *Chorpenning* v. *United States*, 3 Ct. of Cl. 140. The claimant appealed to this court. While the appeal was pending, Congress passed the resolution of July 15, 1870. Under that resolution Postmaster-General Cresswell found there was due to the claimant the further sum of $443,010.70. Before any thing further was done, Congress, by a resolution of the 9th of February, 1871, 16 Stat. 702, repealed the resolution of the 15th of July, 1870, under which the last adjustment was made, and by the act of March 3, 1871, 16 Stat. 519, directed that no part of the money thereby appropriated for the use of the Post-office Department should "be applied to the payment of what is known as the Chorpenning claim."

Upon analyzing the resolution of 1870, it is found to contain the following provisions: 1. The Postmaster-General was authorized to "investigate and adjust" anew the claims of George Chorpenning under the first section of the act of 1857, "on the basis of compensation allowed by said act for regular mail service." 2. "And the claim growing out of the curtailment and annulment of his contract on route No. 12,801, on the basis of his agreement with the Postmaster-General for the service, to be settled as provided for the services named in said act." 3. "And the right of appeal from the proceedings of the Postmaster-General to the Court of Claims" was "reserved and allowed to the said claimant."

The act of 1857 became defunct by what occurred under it in that year. It was in no wise revived by the resolution of 1870. It was only referred to by that resolution for the rules and basis upon which the new adjustment authorized was to proceed.

The question before us is as to the effect of the repealing resolution of 1871. In considering that subject, the act of 1857 may be laid out of view, and will not be further adverted to.

The resolution relied upon by the appellant was wholly

unilateral. It contained no stipulation of payment, express or implied. Congress, for its own reasons, simply directed an examination and adjustment. It gave no promise and came under no obligation to the other party, and asked and received none from him. The government and the claimant stood, and continued to stand, wholly independent of each other. The government could at any time before payment recall what it had done, and the claimant was at liberty up to the same period to refuse concurrence, and assert *aliunde* his legal rights, if any he had. Prior to that time there could be no vested right and no commitment of either party, not subject to the exercise thereafter of such discretion, affirmative or negative, as might be deemed proper. The case presents the same legal aspect as if it were between individuals. If a merchant should direct his clerk or other agent to "investigate and adjust the claim" of a third party upon a prescribed basis, and the adjustment was made accordingly, can it be doubted that the merchant might thereafter, because he had come to the conclusion that the claim was tainted with fraud or had been already fully paid, or for any other reason, or as a matter of choice, without assigning any reason, decline to recognize what had been done as of any validity, and withdraw the authority under which the proceeding had been taken?

The reason of the right would be that there was no binding mutuality of assent, no consideration, and hence no legal obligation resting upon either party. The duty devolved upon the Postmaster-General was wholly ministerial, and in no sense judicial, or that of an arbitrator. The record discloses no element of an arbitrament. The adjustment, having been made under a special law, renders it in no wise different as regards the point we are considering from those made daily by the accounting officers of the government, under the general law conferring their powers and prescribing their duties. The idea that the government is finally concluded by the results at which they may arrive would be regarded as a novelty within and without the several departments.

The implication from the repeal of the resolution of 1870, and the prohibition in the act of 1871, is clear that Congress did not intend that any thing more should be paid to the

claimant without further authority from that body. *United States* v. *Babbitt*, 1 Black, 55. This case is not distinguishable in principle from *Gordon* v. *United States*, 7 Wall. 188. Aside from the views we have expressed, that adjudication is conclusive as authority against the appellant.

Our attention has been called by the counsel on both sides to the clause of the resolution giving the claimant the right of appeal from the findings of the Postmaster-General to the Court of Claims. The view which we take of the case renders it unnecessary to consider that point, and we express no opinion upon the subject. *Judgment affirmed.*

UNITED STATES v. MARTIN.

1. The act of Congress of June 25, 1868 (15 Stat. 77), declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the government of the United States, is in the nature of a direction by the government to its agents.
2. It is not a contract between the government and its laborers, that eight hours shall constitute a day's work. It neither prevents the government from making agreements with them, by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours' labor.
3. Where, therefore, a laborer, in the habit of working for the government twelve hours a day, for $2.50 a day, is informed by the proper authority that, if he remains in the service at that compensation, he must continue to work twelve hours a day, and he does so continue, and is paid accordingly, he cannot afterwards recover for the additional time over eight hours as a day's labor.
4. An allowance by the government, upon the application of the laborer, of a sum for the excess of time over eight hours per day, is, when accepted by him in full of the account, a bar to any further claim.

APPEAL from the Court of Claims.

This was a petition filed by Martin against the United States. The court below found the following facts: —

1. In the year 1866 or 1867 the claimant was employed by the foreman of the steam-heating and gas works at the Naval Academy, at Annapolis, to work for the defendants at $2.50 a day, with the understanding that during the season of steaming, which was from the 1st of October to the 1st of June, his time

of labor was to be twelve hours a day. During the seasons of steam-heating he was fireman at the steam-boilers, and at other times he was employed in assisting in repairing pipes, digging, and shovelling, or in ordinary labor and work.

2. In July, 1868, upon the passage of the act constituting eight hours as a day's work for all laborers employed on behalf of the government, called the "Eight-Hour Law," 15 Stat. 77, the claimant and other laborers at said academy spoke about that law to the foreman, who put on an additional man in the gas-works (where the claimant was not employed), and reduced the time of labor of the men in said gas-works to eight hours a day. Soon afterward, the men told him they would rather have half a dollar a day additional than to have the eight hours' work. Admiral Porter, then superintendent of the academy, was informed of what the men said, and he told the foreman that he would not give more pay, and that if any one would not work the full hours, he would put some one in his place. The claimant was present and heard this conversation. Nothing more was said or done in the matter, and the claimant went on with his work, laboring the number of hours per day as before, according to the original understanding.

3. From the 25th of June, 1868, when the eight-hour law passed, to the 19th of May, 1869, when the President's proclamation in relation to said act was issued, 16 Stat. 1127, the claimant worked two hundred and thirty-one calendar days, twelve hours each day, and ninety-seven calendar days, eight hours each day. From said 19th of May, 1869, to the time of his final discharge, Oct. 15, 1872, he worked seven hundred and fifty-two and a half calendar days, twelve hours each day, and four hundred and thirty nine and a half calendar days, eight hours each day.

4. For all of said labor the claimant was paid at the rate of $2.50 per calendar day, except that, for reasons which do not appear in evidence, he was paid at the rate of $2.25 per day for seventy-four days of twelve hours each, in March, April, and May, 1870, and for twenty-six days of eight hours each, in June, 1870. Payments at said rates were made to him at the end of each month during his time of service, and were received by him without protest or objection.

5. While the claimant was so employed, the pay of ordinary laborers at the academy was $1.75 a day; and the firemen were paid $2.50 a day, because the time was longer and the work harder. The wages of firemen in the works of the gas company, a private corporation, at Annapolis, has since the war been $2 a day of twelve hours' labor, and they had more work to do than the claimant had while similarly employed by the defendants.

6. In the year 1873, the claimant made a formal application, in writing, to the Fourth Auditor of the Treasury, for arrears of pay, claimed as due him under the second section of the act of May 18, 1872, 17 Stat. 134, between the 25th of June, 1868, and the 19th of May, 1869, on account of his said employment. The auditor thereupon stated the account, and allowed the claimant $205.63, which was admitted by the Second Comptroller; and that amount was paid to the claimant, who receipted for the same, in writing, in full of the account.

The court below dismissed the petition, but, on a subsequent day of the term, made an order vacating the judgment, and directing, for the purpose of an appeal, a *pro forma* judgment to be entered in favor of the claimant in the sum of $1,019.49.

The United States thereupon appealed.

Mr. Assistant Attorney-General Smith for the United States.

Mr. Charles E. Hovey, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

On the 25th of June, 1868, Congress passed an act (15 Stat. 77), declaring "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the government of the United States." Rev. Stat. sect. 3738.

This was a direction by Congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service. It prescribed the length of time which should amount to a day's work, when no special agreement was made upon the subject. There are several things which the act does not regulate, which it may be worth while to notice.

First, It does not establish the price to be paid for a day's

work. Skilled labor necessarily commands a higher price than mere manual labor, and whether wages are high or low depends chiefly upon the inquiry whether those having labor to bestow are more numerous than those who desire the service of the laborer. The English statute-books are full of assizes of bread and ale, commencing as early as the reign of Henry II., and regulations of labor, and many such are to be found in the statutes of the several States. It is stated by Adam Smith, as the law in his day, that in Sheffield no master cutler or weaver or hatter could have more than two apprentices at a time, and so lately as the 8th Geo. III., an act, which remained unrepealed until 1825, was passed, prohibiting, under severe penalties, all master tailors in London, or within five miles of it, from giving, or their workmen from accepting, more than two shillings sevenpence halfpenny a day, except in the case of general mourning. Smith's Wealth of Nations, 125 (6th Oxford ed. of 1869). A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen, and of whatever degree of skill, and at whatever price, they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle. It does not specify any sum which shall be paid for the labor of eight hours, nor that the price shall be more when the hours are greater, or less when the hours are fewer. It is silent as to every thing except the direction to its officers that eight hours shall constitute a day's work for a laborer.

Second, The statute does not provide that the employer and the laborer may not agree with each other as to what time shall constitute a day's work. There are some branches of labor, connected with furnaces, foundries, steam or gas works, where the labor and the exposure of eight hours a day would soon exhaust the strength of a laborer, and render him permanently an invalid. The government officer is not prohibited from knowing these facts, nor from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work. Nor does the statute intend that, where out-of-door labor in the

long days of summer may be offered for twelve hours at an uniform price, the officer may not so contract with a consenting laborer.

We regard the statute chiefly as in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest. The proclamation of the President and the act of 1872 are in harmony with this view of the statute.

We are of the opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal and binding upon the parties making them.

In the case before us, the claimant continued his work, after understanding that eight hours would not be accepted as a day's labor, but that he must work twelve hours, as he had done before. He received his pay of $2.50 a day for the work of twelve hours a day, as a calendar day's work during the period in question, without protest or objection. At that time ordinary laborers under the same government received but $1.75 per day at the same place, and those engaged in the same department with the claimant in a private establishment, at the same place, received but $2 for a day's work of twelve hours, and the finding adds, "they had more work to do than the claimant had while similarly employed." The claimant's contract was a voluntary and a reasonable one, by which he must now be bound.

In 1873, the claimant applied for the same arrears of pay as are here in question, and received from the auditor an award of $205.63. That amount was paid to the claimant, and he receipted in writing in full for the account. This has often been held in this court to be a bar to any further claim. *United States* v. *Justice*, 14 Wall. 535; *United States* v. *Child*, 12 id. 232.

Judgment reversed, and cause remanded with directions to dismiss the petition.

GOULD v. DAY.

1. The delivery of a deed conveying land will, in the absence of direct evidence of the fact, be presumed from the concurrent acts of the parties recognizing a transfer of the title. Thus, where a deed had been executed and recorded without the knowledge of the grantee, who subsequently, upon request of the grantor, conveyed the land to a third party, it was *held* that this recognition by both parties of the transfer of the title was sufficient evidence that at that time the deed had been delivered.
2. Certain lands in Michigan, sold for taxes, were, for want of other purchasers, bid in by the State. Before the sale became absolute, the owner of the property, having a complete title thereto at the time the sale was made, purchased the State bids. *Held*, 1. That a redemption of the property from the sale was practically effected by the purchase. 2. That the ownership of the State's lien and the ownership of the title to the lands being thus united in the same person, the lien was merged in the title. 3. That tax-deeds, subsequently executed to the owner by the State, were only evidence that the taxes were satisfied, the lien of the State discharged, and the estate restored from the sale: they transferred no new title to the grantee.
3. Where a question put to a witness is in itself unobjectionable, but the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such case to the answer. *So held*, where a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, and he stated in his answer what, in his judgment, the quantity was.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The action was on the case against Gould, the defendant in the court below, for selling lands, situated in the State of Michigan, under a power of attorney from the person appearing to be the owner on the public record of deeds, knowing at the time that the property belonged to the plaintiff. The declaration avers that the several parties who bought at the sales thus made were purchasers for a valuable consideration, in good faith, without notice of the rights of the plaintiff, and that the property has thus been lost to him.

The lands were originally derived from the United States, under a grant to aid in the construction of a railroad in Michigan. In April, 1865, Charles J. Anthony, of the city of New York, the then owner, conveyed them to his brother-in-law, Cyrus F. Jackson, who was ignorant of the fact that the deed had been made and recorded. In June following, Jackson, at

the request of Anthony, conveyed them to Anna D. Anthony, his wife, and, on Sept. 2, 1867, Anthony and wife conveyed them to the plaintiff, Henry Day, in settlement of a claim of the latter, amounting to $38,000. All the conveyances, except the one from Jackson to Mrs. Anthony, were, within a few months after their execution, placed on record in the proper offices of registry where the lands are situated. The one to her appears to have been mislaid; at any rate, it was not recorded until January, 1871. The plaintiff was not aware, when he took the deed to himself, of any defect in the record of the title.

Some time in the spring of 1869, about a year and a half after the plaintiff's purchase, Jackson, who claimed that Anthony, Day, and others were indebted to him for services to the amount of $781, discovered, in what way does not appear, that of the land conveyed to him by Anthony in 1865 two sections in Gratiot County were left standing in his name on the public records, and he undertook to make his claim out of these sections.

With this object in view, he wrote to a friend on the subject in Owosso, Mich., near which the lands are situated, and that friend gave the letter to a lawyer of the place, the defendant, Amos Gould, to answer. Gould accordingly wrote to Jackson, under date of May 22, 1869, stating that he himself was a large owner of railroad lands in his own right, and was prepared to trace out the title to any of them; that, if desired, he would take measures to find out all the lands to which Jackson had any title, and sell them, if an opportunity offered. A correspondence then followed between Jackson and Gould, lasting for some weeks. In that correspondence Jackson did not pretend that he in fact owned any lands in Michigan, but stated that he understood that Anthony, for whom and others he had been engaged in locating railroad lands in that State, had, in making deeds of the lands, left two sections standing on the records in his name; that he had been requested to convey these sections to the plaintiff, Day, but had refused to do so unless Day would see his claim paid. Through all his letters, the only wish expressed was to recover his claim; when that was paid, he was willing to execute any deeds desired. On the other hand, Gould, who, in looking up the title to the sections

named, had discovered that the deed of Anthony, which conveyed the sections to Jackson, also embraced several thousand acres of other lands, and that the deed of Jackson to Mrs. Anthony had not been placed on record, wrote to Jackson, that, in order to aid him and protect his interest, it would be best for him and his wife to execute a power of attorney, which he enclosed, to sell the two sections mentioned, and added, that there might be other land similarly situated in other counties, and, in order to take charge of whatever there might chance to be, he had made the power broad enough to cover it all. He at the same time advised Jackson to make no answer to any letters received from Day or others on the subject, until information of what they contained was communicated to him, and his advice taken as to the reply. The power of attorney, bearing date June 14, 1869, and authorizing Gould to sell the two sections, and all other lands of Jackson situated in the State, was accordingly executed, and returned to Gould; and he immediately proceeded to sell not only the two sections, but other large tracts. Shortly after the receipt of the instrument, he disposed of 5,642 acres for the sum of $8,495, of which 5,522 acres were sold to his son-in-law. The first sale, on June 21, was of 1,280 acres, for $1,920; the second, June 26, was of 120 acres, for $1,200; either of which produced more than sufficed to satisfy the claim of Jackson, which, as already stated, amounted only to $781, and the expenses incurred for its collection.

In a subsequent communication to Jackson, marked "confidential," made after the first sale, the fact that a sale had been made was concealed, and an opinion expressed, that in a few months the claim could be made, but of that he could not speak with certainty until he had perfected his examination; he, however, advised Jackson to send all letters received on the subject of the lands to him, and not to answer any of them until properly instructed, and, if asked about the lands, to say that he owned them, and had bought and paid for them.

Repeated efforts were subsequently made to obtain from Gould a list of the lands sold, and a statement of the amount received; but nothing could be heard from him beyond the fact that he had disposed of all the lands in Michigan he could

find to which Jackson appeared to have the title. He declined to give any information as to the property sold beyond this general statement, and he rendered no account of the proceeds received. When informed by Jackson of the anxiety of Anthony and Day, he wrote to Jackson, saying: "You and I should have nothing to say to Mr. Anthony or Mr. Day, except that you have sold the lands, and have no more to do with the matter. We can do ourselves no good by talking too much with the other side."

The want of success attending the efforts to ascertain the sales made, and the pressure brought by Day upon Jackson for a conveyance of the lands, led to the exposure of the correspondence with Gould, and ultimately to the institution of the present action.

A considerable portion of the lands conveyed by Anthony and wife was, in October, 1867, sold for taxes assessed in 1866, and bid in by the State. On May 9, 1868, Day, the plaintiff, bought the State bids, and on Feb. 11, 1869, the Auditor-General made quitclaim deeds of the land to him. Of these deeds there were seven; but, one of them being for land sold and conveyed in 1862, the court told the jury that the plaintiff had not shown any title to the land it covered. So this deed may be put entirely aside. There then remained six tax-deeds made by the Auditor-General to the plaintiff of his own land; and these deeds the defendant Gould offered for the purpose of showing that the plaintiff could not recover, because in June and July, 1869, he acquired title to the lands by said tax-deeds, and that hence a conveyance of them by Gould, as attorney of Jackson, to other parties could not injure him.

In other words, the position of the defendant was that the tax-deeds gave the plaintiff a new and paramount title, which extinguished all his previous titles, and that Gould's conveyance of Jackson's title of record could therefore do the plaintiff no harm.

To show the value of some of the lands sold by the defendant under the power of Jackson, a witness by the name of Alexander W. Heather was introduced upon the part of the plaintiff as an expert in the business of examining pine-timber lands, and making estimates of the quantity of timber thereon, and of

the value of such lands in the region where these were situated. He testified that he had examined certain of the lands in question in 1861, and gave evidence tending to show that he found that the timber had been cut off subsequently to the sale of them by the defendant under the power of an attorney from Jackson. Witness was then asked this question: "From the stumps, could you form a judgment of the timber that had been there?"

This question was objected to by the defendant as incompetent; but the objection was overruled, and the witness answered: "I judge from what stumps I saw that there had been about fifteen millions of feet cut off the lands altogether."

To this ruling of the court exception was taken.

The court was requested by the defendant's counsel to charge the jury, among other things, as follows: That if they found that the deed from Anthony to Jackson put in evidence by the plaintiff was made and recorded without the knowledge of Jackson, and never delivered to him, then no title to the land described therein passed to him, and the plaintiff obtained no title thereto by virtue of his deed from Anna Anthony.

That the tax-deeds put in evidence were *prima facie* evidence that the title to the lands therein described was in the plaintiff at the time when the defendant, as attorney for Jackson, attempted to convey the same, and therefore, as to such lands, the plaintiff could not recover against the defendant, as he had not been injured by such attempted conveyance as attorney for Jackson.

The court refused to thus charge the jury, and the defendant excepted. But upon the first of these requests the court instructed the jury as follows: —

That if they should find that Jackson acted upon the deed made to him by conveying the lands afterwards to Mrs. Anthony, that then the delivery was of no consequence. He thereby affirmed the conveyance to himself, and neither he nor Gould, the attorney under him, could question it. It also charged that his acting upon the title, by assuming to convey the same, or rather to authorize the conveyance of the same by a power of attorney to Gould, was a ratification of it, and the want of delivery was of no importance in the case. The title was as

perfect as if the delivery had been made at the commencement.

The jury found for the plaintiff, and assessed his damages at $38,020.65; and they found specially, upon certain questions of the defendant propounded to them in writing, as follows: —

"'1st, Was the deed from C. J. Anthony and wife, to Cyrus F. Jackson, ever delivered to said Jackson, or to any one for him?' They answered, 'We find no actual delivery.'

"'2d, Did said Jackson have any knowledge, previous to the execution of said deed, that it was to be executed?' They answered, 'No.'

"'3d, Did he, after its execution, in any way accept it?' They answered, 'Yes.'

"'4th, Did the defendant, when he executed the conveyance as attorney for Jackson, have any knowledge or belief that the plaintiff had any title to lands thus conveyed, or any valid claim thereto?' They answered, 'Yes.'

"'5th, Did the defendant, when he executed the conveyance as attorney for Jackson, believe that said Jackson had the legal title to the lands so conveyed?' They answered, 'No.'"

They also answered "yes" to the following question of the plaintiff: —

"'Did not the defendant, at the time he sold the lands in question, have knowledge of such facts as brought to him notice that plaintiff claimed these lands, and which, if followed in good faith, would have led him to a knowledge of plaintiff's full title.'"

Judgment being entered upon the verdict, the defendant brought the case here on writ of error.

Mr. C. I. Walker for the plaintiff in error.
Mr. Henry Day for the defendant in error.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The whole conduct of Gould, as disclosed by his letters, indicated a fraudulent purpose. It might justly be termed larcenous, if larceny could be applied to a fraudulent sale of another's lands, and the retention of the proceeds. He knew that Jackson was not the owner of the lands which were sold

in his name. The jury have found as a fact, that, when he made the conveyances, he did not believe that Jackson had any title. He was aware, therefore, all the time, that he was defrauding the true owner, whoever he might be, by the use of the power of attorney. The jury have also found that he had knowledge of facts which informed him that the plaintiff claimed the lands, and which, if followed in good faith, would have disclosed the plaintiff's full title; and that he then knew or believed that the plaintiff had the title, or a valid claim, to the lands. From the outset, he was made acquainted with the fact that whatever title remained on the records in the name of Jackson was there by accident or mistake, and that all Jackson asked was that the property thus situated might be subjected to the payment of his claim. Learning the true condition of things, that the deed to Mrs. Anthony had never been recorded, he concealed the fact from Jackson, advised him to set up a false claim of title, obtained from him, under pretence of aiding him and protecting his interests, a power of attorney to sell any lands in the State, and then proceeded at once to dispose of not merely the two sections which Jackson had originally desired to subject to the payment of his claim, but immense tracts of other lands. After this, he refused to give any account of the sales made, and, with the exception of paying the claim of Jackson, he put all the proceeds into his own pocket, amounting to several thousand dollars. As said by counsel, fraud and guilty knowledge are written all through his letters.

Now, when called to account for his acts, he sets up as a defence, —

1st, That Jackson never acquired the title to the lands, sold under the power, by the deed from Anthony in 1865, inasmuch as he was not aware of the execution of that deed at the time, and, consequently, there was no formal delivery of it to him; and,

2d, If he did thus acquire the title, the plaintiff was not injured by the sales, because he had previously purchased the lands at tax sales, and thus obtained a superior title to the property.

If these defences could be sustained, they would only show that the defendant is not liable in this action, not because he

was guiltless of fraud, but because the fraud committed injuriously affected only other parties. His conduct would not then stand in any better light. But the defences are not tenable.

It is true that Jackson was ignorant of the fact that Anthony had made a deed of the lands to him in 1865, until he was called upon to reconvey them; but, when informed of the fact, he immediately acted upon the assumed validity and operation of the instrument, and executed the desired conveyance. Now, while it is law that a delivery of a deed is essential to pass an estate, and there can be no delivery without a surrender of the instrument or the right to retain it, such delivery will be presumed, in the absence of direct evidence, from the concurrent acts of the parties recognizing a transfer of the title. The question here is not whether the delivery took place at the date of the deed, but whether it took place at all. The acts of the grantor and grantee — the one in asking a reconveyance and the other in making it — were satisfactory evidence that at that time the delivery had been made, and they justified the finding of the jury that the deed had been accepted by Jackson. *Jackson* v. *Cleveland*, 15 Mich. 94.

As to the tax sales, they were made in 1867 for unpaid taxes of 1866; and, for want of other purchasers, the lands were bid in by the State. The sales were made after the plaintiff had purchased the lands; but in May, 1868, before the time of redemption had expired, he bought the State bids, and in February, 1869, received quitclaim deeds from the auditor-general of the State. These deeds were produced by the defendant to show that at the time of his sales in June and July following, under the power of attorney of Jackson, the plaintiff possessed a superior title, which was not affected by those sales, and thus that the fraud which the defendant committed injured only the purchaser who trusted him, and did not injure the plaintiff. The answer to this position is obvious: the plaintiff, by his purchase of the State bids, practically redeemed the property from the tax sales, and therefore acquired no new or additional title by the tax-deeds. Whatever operation the deeds had under these circumstances, it was only as evidence that the taxes were satisfied, the lien of the State

discharged, and the estate restored from the sale. By the law of Michigan, taxes upon real property constitute a lien upon it, which continues through all its transfers, until the taxes are paid, or the sale of the property for their payment has become absolute. Whoever subsequently purchases the property is presumed to know of the taxes existing at the time, as they are a matter of public record; and the law informs him that he must see that they are paid, or suffer a possible loss of his estate. Whether in the present case the plaintiff stood in any such relation to his vendor as to make it obligatory upon the latter to pay the taxes previously assessed we are not informed; nor is it material. The State looked only to the property, and did not concern itself as to the relations between the former and present owners. If, therefore, the plaintiff did not wish to see his interest sacrificed, his only course was to pay the taxes before the sale, or to redeem the land from the sale afterwards. By the purchase of the bids before the sale became absolute, he practically effected a redemption. He thus united in himself the ownership of the State's lien and the title to the lands. This union of conflicting interests operated to merge the lesser interest in the greater, the lien in the title. One cannot have a lien upon his own property, except where equity interposes, and, to prevent a failure of justice, keeps the lien outstanding; and here there was no interference of equity, and no occasion for its interference. The rule of law took effect at once, and the State lien was *eo instante* merged in the plaintiff's general title. The operation of the purchase was not unlike that which would have followed from the purchase by the plaintiff of a mortgage upon the premises executed by his vendor; the transfer of the mortgage would be equivalent in its effect to a satisfaction of the demand secured, and a release of the security. So, here, the transfer of the bid to the owner of the property sold was in law equivalent to a payment of the taxes and a discharge of the lien. Any subsequent deed in the one case from the mortgagee, or in the other from the State, could have no operation as conveyances of any interest to the grantee. It is certain that the plaintiff, in buying the State bids, and subsequently taking the State deeds, never supposed that he was thereby impairing or destroying his original title. There was

at the time no defect in that title, and there was no adverse interest claimed in the lands; and he was not aware that the conveyance to his grantors had not been recorded. *Smith* v. *Lewis*, 20 Wis. 354. The only title which a stranger could have obtained by the tax-deeds, he had already acquired by his purchase from the previous owners.

The court below, therefore, did not err in refusing the instruction asked, that the tax-deeds were *prima facie* evidence that the title to the lands embraced in them was in the plaintiff, when the defendant, as attorney for Jackson, attempted to convey the lands to others; and that, therefore, as to such lands, the plaintiff was not injured by the conveyances made. Whatever *prima facie* evidence of such title the deeds might have been by themselves, was overcome by the fact that the grantee was, at the time of the tax sales, the owner of the property, and, as such, had practically redeemed it from the sales. A tax-deed executed after redemption from the sale, or, what is in legal effect the same thing, after the lien of the tax has been transferred to the owner of the property before the sale has become absolute, confers no title.

The objection to the testimony of the witness Heather, in answer to the question whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, is untenable; for it was not taken in the court below. The question was there objected to, not the answer. The question only inquired as to the witness's ability to judge from an existing fact what a previous fact might have been, and in itself was unobjectionable. If his answer went beyond the question, it was to that the objection of counsel should have been directed, by a motion to exclude it as not responsive, or otherwise improper, or as incompetent testimony. *Judgment affirmed.*

PEOPLE v. COMMISSIONERS OF TAXES AND ASSESSMENTS.

1. The shares of stock of a national bank in New York should be assessed for taxation at their actual value.
2. The ruling in *Van Allen* v. *The Assessors*, 3 Wall. 573, as to the invalidity of the act of the legislature of New York of March 9, 1865, known as the Enabling Act, so far as it provided for the taxation of shares in a national bank, reaffirmed.

ERROR to the Court of Appeals of the State of New York.

The relator, the Gallatin National Bank of the city of New York, was, prior to 1864, a State bank, incorporated under the general banking laws of New York. It surrendered that charter, and was reorganized as a national bank, under the act of Congress of June 3, 1864, 13 Stat. 99, known as the National Banking Act, and c. 97 of the laws of 1865 of New York, known as the "Enabling Act," with a capital of $1,500,000, divided into thirty thousand shares of $50 each.

The bank has reserved from profits $300,000. It also holds, on deposit with the treasurer, bonds of the United States of the par value of $591,000, on which the premium, estimated at twenty per cent, would be $118,200; so that the bank has, in addition to its capital, a surplus of $418,200.

The commissioners of taxes and assessments of the city of New York having signified their intention to tax this surplus, the president of the bank made a statement of its condition. Its capital and surplus were shown to be $1,918,200, which, on a division, would make each share $63.60. As those bonds were liable to daily and almost hourly fluctuation, and so might slightly exceed the estimate, he made affidavit that the value of each share did not exceed $64.

Thereupon the commissioners, deducting $5 per share as the proportion of the assessed value of the bank's real estate, took $59 as the valuation of each share, and imposed the tax accordingly. The relator, to test the validity of such assessment, sued out of the Supreme Court of the State a writ of *certiorari*, which, upon a hearing, was quashed; and it thereupon appealed to the Court of Appeals, where the judgment below was affirmed. It then brought the case here.

The statutes bearing upon the question at issue are set forth in the opinion of the court.

Mr. Daniel D. Lord for the appellant.

The surrender by the Gallatin Bank of its original charter, and its reorganization under the National Bank Law, in conformity with the Enabling Act of New York, formed a contract with the State, limiting, for taxable purposes, the assessment of the shares of the bank to their par value. This contract is as much protected by art. 10 of the Constitution of the United States as are contracts between individuals. *Prov. Bank* v. *Billings*, 4 Pet. 514; *Gordon* v. *Tax Court*, 3 How. 133; *Piqua Bank* v. *Knoop*, 16 id. 369; *Ohio Life Insurance & Trust Co.* v. *De Bolt*, 16 id. 416; *Jefferson Bank* v. *Skelly*, 1 Black, 436; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Wash. University* v. *Rouse*, id. 439.

Mr. Hugh L. Cole, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The relators complain that their shares of stock in the Gallatin National Bank are assessed at too large a sum. They appeal from the judgment of the Court of Appeals sustaining the determination of the commissioners of taxes, which fixed the taxable value of such shares at $59 each, whereas the par or nominal value of such shares is $50 each.

Many grave questions were discussed by the council upon the argument, to which we do not think it necessary to refer. We place our judgment upon a single ground.

The laws of the State of New York provide that shares of stock like those we refer to shall be assessed "on the value" of the shares, and at "their full and true value, as they (the assessors) would appraise the same in payment of a just debt due from a solvent debtor," deducting the proportional value of the real estate owned by the bank. 2 Stat. N. Y. 1866, p. 1647, c. 71; 1 R. S. N. Y. 393, sect. 17.

The assessors were justified, under this authority, in fixing the value as we have stated. The appraisement included the reserve fund, which is as much a part of the property of the bank, and goes to fix the value of shares, equally as if it were not called by that name, but remained as a part of the

specie, bills discounted, or other funds of the bank, undistinguished from the general mass.

The forty-first section of the act of Congress of June, 1864, provides that the States may tax the shares of national banks, subject to two restrictions: 1st, That this taxation shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;" and, 2d, "that the tax so imposed . . . shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." 13 Stat. 112. In *Hepburn* v. *The School Directors*, this court decided that, in making assessment of bank shares by this authority, it was competent to assess them at an amount above their par value. 23 Wall. 480.

But the relators insist that, by the act of the legislature of the State of New York, passed March 9, 1865, it was enacted that the shares of a bank could not be assessed at an amount greater than the par value thereof, and that such statute created a contract with the banks organized under the same, which could not be altered by a subsequent legislature. Hence it is argued that the act of 1866, authorizing such shares to be assessed at a rate which may exceed their par value, is a law impairing the obligation of a contract, and is void.

The section of the statute of 1865 referred to is as follows, viz.: —

"SECT. 10. All the shares in any of the said banking associations, organized under this act, or the act of Congress, . . . held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State: *Provided*, that the tax so imposed upon such shares shall not exceed the par value thereof; *and provided further*, that the real estate of such associations shall be subject to State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

Had this been a valid statute, we might have been called upon to discuss the point raised. But it was held in *Van Allen* v. *The Assessors*, 3 Wall. 573, that this statute was fatally defective, in that it did not contain a proviso that the tax thereby authorized to be imposed should not exceed the rate imposed upon banks organized under the authority of the State. The system of taxation devised by the statute of 1865 was adjudged to be illegal and void. The clause now laid hold of by the relators was simply a proviso or qualification of that system. It necessarily fell with it. When the main idea was thrown out of existence, the subordinate parts, which were adjuncts of and dependent upon the main theory, ceased to exist. There never was, legally speaking, any such proviso or enactment as the relators claim the benefit of. Of course, there could be no such thing as a violation of contract contained in a proviso which never existed. *Warren* v. *The Mayor*, 2 Gray, 98, 99; Sedgwick on Statutes, 413, 414 (ed. of 1874).

Judgment affirmed.

EX PARTE LORING.

This court will not by *mandamus* compel an inferior court to grant a motion to vacate an order setting aside a judgment of nonsuit.

PETITION for a *mandamus* to the Circuit Court of the United States for the Eastern District of Michigan.

This petition shows that at the June Term, 1874, of the Circuit Court of the United States for the Eastern District of Michigan, William B. True, the plaintiff in an action then pending in that court against Elisha T. Loring, the petitioner, after a jury had been empanelled and the testimony on his part concluded, elected to become nonsuit, and that a judgment to that effect was entered. On the 17th October, 1876, at a subsequent term of the court, after notice to the attorney of Loring, True moved to set aside this judgment and restore the cause to the docket for trial. This motion was granted Oct. 31, and, later in the term, Loring appeared by his counsel, and

moved to vacate the order then made. This last motion was refused, Jan. 15, 1877, and, Jan. 29, this petition was filed by Loring for a writ of *mandamus* to the judges of the Circuit Court, requiring them "to vacate the order setting aside said nonsuit."

Mr. Alfred Russell for the petitioner.

No opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It seems clear to us that the object in this case is to use the writ of *mandamus* as a writ of error. This cannot be done. We may require the Circuit Court to decide in a proper case if it refuses to act, but cannot control its decision. Here the court has acted, and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of *mandamus* has no such office to perform. *Petition denied.*

SELDEN *v.* EQUITABLE TRUST COMPANY.

A corporation whose business is confined to the investment of its capital in bonds secured by mortgage on real estate, and to the negotiation, sale, and guaranty of them, is not a bank or a banker within the meaning of sect. 3407 of the Revised Statutes.

ERROR to the Circuit Court of the United States for the District of Connecticut.

The facts are stated in the opinion of the court.

Argued by *Mr. Assistant Attorney-General Smith* for the plaintiff in error, and by *Mr. Augustus Brandegee* and *Mr. Jeremiah Halsey, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The Equitable Trust Company is a corporation created by the laws of the State of Connecticut, and its principal office or place of business is at New Haven, in that State. Its "only business

has been and is the investing of its own capital in mortgage securities on real estate, and selling such mortgage securities with the company's guaranty. It does not collect or receive, nor has it ever collected or received, any deposit of money subject to be paid, or remitted on draft, check, or order; nor does it receive deposits, issue notes, or make discounts of any description whatsoever, nor do any other business than above stated." In "investing said capital in mortgage securities on real estate as aforesaid, the manner adopted by the corporation has been and is as follows: To make loans thereof to individuals, taking from the borrower a bond, . . . and securing the payment of said bond by a mortgage deed of real estate, executed by the borrower in conformity with the laws of the State where such real estate is situated. To the negotiation, sale, and guaranty of such bonds this company is exclusively devoted, and it incurs no obligations except those arising from such guaranty." That such is the character of the company, and that such is the nature of its business, is stipulated of record; and the only question presented by the case is, whether a corporation doing such a business is a "banker" within the meaning of sect. 3407 of the Revised Statutes of the United States relative to internal revenue.

Clearly, the company is not a banker in the ordinary acceptation of the word. But Congress has defined who shall be regarded as bankers, for the purposes of taxation under the revenue laws. Sect. 3407 of the Revised Statutes, p. 673, enacts that "every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid, or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

The statute describes three classes of artificial and of natural persons, distinguished by the nature of the business transacted by them, and declares that individuals embraced in either of the classes shall be considered bankers. The first class is com-

posed of those who have a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order. It is not claimed the company engaged in that branch of business, or that they are included in this first class. The agreed state of facts expressly repels any such claim.

The second class are those who have a place of business where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes. It is contended on behalf of the plaintiff in error that the company is included in this class, because it advances or loans money on bonds. The case, however, states that all the loans the company makes are investments of its own capital in mortgage securities on real estate. It is true the bonds of the borrowers are taken with the mortgages, but the bonds are mere evidence of the debt. The money is advanced or loaned on the security of the real estate mortgaged, and not on the security of the bond. We think Congress, in the clause of the act we are now considering, intended reference to transactions entirely different from loans or advances made on the personal promise or undertaking of the borrower. The words used are not technical. They are, therefore, to be understood in their common and popular sense. Dwarris on Statutes, 578. And that, in common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an advance or loan where those species of property are pledged as collaterals, or are hypothecated to secure the return of the advance or the payment of the sum lent, is unquestionably true. It can be nothing else where the money is advanced or lent on stocks or bullion; and, by the statute, bonds, bills of exchange, and promissory notes are placed in the same catalogue with stocks and bullion. All of them are alike the subjects on which the advance or loan is made. It is a fair presumption, therefore, that Congress regarded an advance or loan on bonds as similar in its character to an advance or loan on stocks, involving in each case an hypothecation of the subject on which the advance is made. If not so, if it was intended to embrace loans generally, there was no necessity for introducing the qualifying words "on bonds, bills of exchange, or promissory notes." It was, however, not the lending,

but the method or mode of operation, which was in view. If it was mere lending Congress had in contemplation, it is difficult to conceive of a reason why mortgages of real estate were not included with stocks, bonds, bullion, &c. But it is a well-known common usage for banks to make advances or loans on the hypothecation or pledge of such property, though not upon the hypothecation or mortgage of real estate. There was a reason, therefore, for omitting real estate from the catalogue of things upon which the advances or loans contemplated might be made. Advances on that are not within the ordinary business of a banker. To us, therefore, it appears plain that it is the business of advancing or lending in the mode usual with bankers — that is, on collaterals or on the pledge of personal property — that, by the statute, is defined to be banking, within the intention of Congress, and that lending upon mortgages of real estate is not intended.

The third class described by the statute comprises those who have a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale. The language is not "where stocks, bonds, &c., are sold," or "are held for sale." Surely Congress did not intend that corporations or persons who have a place of business where they sell their own stocks, bonds, bullion, bills, or notes should be regarded as bankers. If they did, a vast proportion of the corporations and of the merchants and manufacturers of the country would be included. But the language of the statute is, "where" such property is "received" "for discount or for sale." The use of the word "received" is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills, or notes, for discount or for sale. He receives the bonds, bills, or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion, or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In

common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner. He is not one who buys and sells on his own account.

The Equitable Trust Company lent its own money, taking bonds and mortgages therefor. Those bonds it sold with a guaranty. It sold only its own property, not that received from other owners for sale. Such a business, in our opinion, did not constitute the corporation a banker, as defined by the revenue laws. *Judgment affirmed.*

DAVIS v. BROWN.

1. An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made.
2. *Bank of United States* v. *Dunn*, 6 Pet. 51, explained and qualified.
3. An agreement like the one mentioned above, and the indorsement, taken together, are equivalent, so far as the holder of the note is concerned, to an indorsement without recourse to the indorser.
4. The omission of indorsers on a series of notes, transferred to the holder in settlement of their own note held by him, upon an agreement in writing that they should not be held liable on their indorsement, to set up the agreement as a defence to an action against them, brought by the holder on two of the notes, does not preclude them from setting up the agreement in a second action by the holder on others of the same series of notes. The judgment in the original action does not operate as an estoppel against showing the existence and validity of the agreement in the second action.
5. When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was against the defendants, as second indorsers of certain promissory notes, transferred by them to the Ocean National Bank of the city of New York. The bank having failed, the notes came into the possession of the plaintiff, as its receiver. The facts are sufficiently stated in the opinion of

the court. The defendants obtained judgment, and the plaintiff brought the case here.

Argued by *Mr. H. G. Miller* for the plaintiff in error, and submitted by *Mr. U. P. Smith* and *Mr. Stephen Sibley* for the defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action against the defendants, as second indorsers upon ten promissory notes of one McOmber, made at Saratoga Springs, in the State of New York, in June, 1870, each for $500, and payable to his order in from thirty-two to forty-one months after date.

The defence set up to defeat the action was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were indorsed by the defendants as a mere matter of form, upon an agreement in writing of the bank that they should not be held liable on their indorsements, or be sued thereon.

On the trial, Harvey Brown, one of the defendants, was called as a witness to prove the matters thus set up as a defence, and was permitted, against the objection of the plaintiff, to testify to the settlement of the note of the defendants, the transfer for that purpose to the Ocean National Bank of the McOmber notes, and their indorsement by the defendants under the agreement of the bank not to hold them liable as indorsers; and that this agreement was in writing, and was destroyed in the great fire at Chicago, in October, 1871.

To meet and repel the defence founded upon this agreement, the plaintiff produced and gave in evidence a record of a judgment, recovered by him against the same defendants upon two other notes of the same party, of like amount and date as those in suit, except that they became due at an earlier day, which were part of the series of notes transferred by the defendants to the bank, and indorsed by them, in settlement of their own note, as already mentioned, and were included in the agreement as part of the same transaction.

The questions presented for our determination relate to the

competency of the witness Brown, and the admissibility of the evidence of the alleged agreement of the bank, and to the operation of the judgment mentioned as an estoppel against the defendants setting up any defence founded upon the agreement.

The objection to the witness arose from his being a party to the notes, and, as such, it is contended that he was incompetent to impeach or discredit the same, or to show that his liability was not such as his indorsement imported. The case of *The Bank of the United States* v. *Dunn*, reported in the 6th of Peters, is cited in support of this position. There, the indorser of a note had been permitted by the court below to testify, against the objection of the plaintiff in the action, to a verbal understanding with the cashier and president of the bank which took the note, that he was not to incur any responsibility, or, at least, would not be held liable on the note, until the security pledged for its payment had been exhausted. The admission of the witness this court considered erroneous, holding that no one who was a party to a negotiable note could be permitted by his own testimony to invalidate it, which, in that case, meant that no one could be permitted to show that a note indorsed by him was void in its inception, or that his indorsement did not impose the liability which the law attached to it. The opinion which announces the decision proceeds upon two grounds: 1st, That the evidence would contradict the terms of the instrument, or change their legal import; and, 2d, that it would be against public policy, as tending to destroy the credit of commercial paper, to allow one who had given it the sanction of his name, and thus added value and currency to the instrument, to testify that it was executed or indorsed by him under such circumstances as to impair his obligation upon it.

This last position was supported by reference to the celebrated case of *Walton* v. *Shelley*, 1 T. R. 296, decided in 1786, where the indorser of a promissory note was held by the King's Bench to be inadmissible as a witness, on grounds of public policy, to prove the note void for usury in its inception; Lord Mansfield observing, that it was "of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." Aside

from the assumed estoppel of the parties from their position on the paper, the maxim of the Roman law, that no one alleging his own turpitude shall be heard (*nemo allegans suam turpitudinem est audiendus*), was cited to justify the decision. That maxim was plainly misapplied here by the great Chief Justice; for it is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is, that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character.

The doctrine of *Walton* v. *Shelley* maintained its position in the courts of England only for a few years. In 1798, it was by the same court overruled in the case of *Jordaine* v. *Lashbrooke*, 7 id. 601, Lord Kenyon having succeeded Mansfield as Chief Justice. Since then, the rule has prevailed in the courts of that country, that a party to any instrument, whether negotiable or not, if otherwise qualified, is competent to prove any fact affecting its validity; the objection to the witness, from his connection with the making or circulation of the instrument, only going to his credibility, and not to his competency. In this country, there has been much diversity of opinion upon the point, some of the State courts following the rule of *Walton* v. *Shelley*, while others have adopted the later English rule. The general tendency of decisions here is to disregard all objections to the competency of witnesses, and to allow their position and character to affect only their credibility. This diversity of opinion could not have existed, unless there were grave reasons for doubting the soundness of the original decision. Be that as it may, it has led those courts which, on considerations of commercial policy, adopted the rule of *Walton* v. *Shelley* to qualify the rule, so as to limit its application strictly to cases arising on negotiable bills and notes, and to cases where the transaction affecting the validity of the paper was not between the parties in suit. The holders of commercial paper, who enter into agreements or transactions with the makers or indorsers, affecting its validity or negotiability, can-

not invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts. Thus, in *Fox* v. *Whitney*, 16 Mass. 118, the Supreme Court of Massachusetts, which had previously recognized the rule in *Walton* v. *Shelley*, held that the rule applied only to a case where a man, by putting his name to a negotiable security, had given currency and credit to it, and did not apply to a case between original parties, where the paper had not been put into circulation, and each of the parties was cognizant of all the facts. This decision meets our concurrence, and, if it qualifies the decision in the case of *Bank* v. *Dunn*, we think the qualification a just and proper one.

These considerations dispose of the objection to the competency of the witness Brown. The notes of McOmber were never put into circulation by the Ocean National Bank. No one, therefore, has been misled by the indorsement of the defendants; no false colors have been held out by them. No credit or currency has been given by their name. The receiver has, with reference to the notes, no greater right than the bank has: he stands in its shoes. If the bank could not have enforced a liability upon the defendants against its agreement that they should not be held liable, the receiver cannot enforce it. The agreement itself is not immoral nor illegal. The defendants by their act ran the risk of being charged upon the notes; they would have been liable had the notes been put into circulation. But beyond this risk they were protected by the agreement; upon that they could rely, so long as the bank held the notes.

The objection that the agreement was inadmissible because it tended to vary and destroy the legal effect of the indorsement is not tenable. The agreement, being in writing, is to be taken and considered in connection with the indorsement, and the two are to be construed together. So far as the bank was concerned, the agreement made the indorsement equivalent to one without recourse to the indorsers.

The next question for determination relates to the operation of the judgment recovered by the plaintiff against the defendants, as an estoppel against their setting up the defence founded

upon the agreement. The action in which that judgment was recovered was brought in the same court as the present action, against the defendants as second indorsers upon two notes, which were part of the series of McOmber notes, transferred to the bank of the defendants in settlement of their own note; and their indorsement was embraced in its agreement. The defendants pleaded the general issue; but the court finds that, by the advice of counsel learned in the law, they defended the action in good faith solely upon the ground that their liability had not been fixed as indorsers by due prosecution of the makers of the notes, as required by the laws of Illinois; and that this defence was not sustained, for the reason that it appeared that the makers of the notes resided in the State of New York, and that the indorsement was made there. The agreement of the bank not to hold them liable as indorsers was not pleaded nor relied upon; yet it is contended by counsel, that, inasmuch as it might have been thus pleaded and relied upon, therefore the judgment is an estoppel against the setting up of that agreement as a defence in a subsequent action between the same parties upon other notes, equally as if its validity and efficacy had been litigated and determined.

In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position.

When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic

evidence. We have recently had occasion, in the case of *Cromwell* v. *County of Sac*, *supra*, p. 851, to go over this ground and point out the distinction mentioned; and it is unnecessary to repeat what we there said. See Bigelow on Estoppel; Note to the case of the Duchess of Kingston, in Smith's Lead. Cas.; and Robinson's Practice, vol. vii. The position of counsel is clearly untenable.

As to the objection of want of authority in the president of the bank to make the agreement with the defendants, the finding of the court is conclusive. His authority was a fact to be determined by the court, under the stipulation waiving a jury, and we do not sit in review of questions of fact.

Judgment affirmed.

Mr. Justice Clifford dissented.

McClure v. Township of Oxford.

1. A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account.
2. If any of the essential proceedings prescribed by law for investing municipal officers with power to subscribe for stock, and issue bonds in payment thereof, be dispensed with, the bonds will be invalid in the hands of all who cannot claim protection as *bona fide* holders.
3. Every dealer in municipal bonds, which, upon their face, refer to the statute under which they were issued, is bound to take notice of all its requirements.
4. Where, upon their face, the coupons refer to the bonds to which they were attached, and purport to be for the semiannual interest accruing thereon, the purchaser of them is charged with notice of all which the bonds contain.
5. The bonds issued by the township of Oxford, Kansas, bearing date April 15, 1872, and reciting that they are issued under an act of the legislature of Kansas, approved March 1, 1872, authorizing the township to subscribe for stock in the Oxford Bridge Company, and, in pursuance of a vote of the qualified electors of said township, at an election held therein, April 8, 1872, are void, because, as that act by its terms took effect only from its publication in the "Kansas Weekly Commonwealth," and it was not published until March 21, the election was not held pursuant to a notice of thirty days, as required by the act.

Error to the Circuit Court of the United States for the District of Kansas.

This was an action by the plaintiff to recover upon twenty overdue interest coupons, detached from bonds held by him and issued by the defendant.

The following is a copy of one of the bonds and coupons, all of which were set forth in the declaration: —

"No. ——.] OXFORD TOWNSHIP BRIDGE BOND. [$500.

"The township of Oxford, in the county of Sumner and State of Kansas, hereby promises to pay to —— ——, or bearer, the sum of $500, on the fifteenth day of April, A.D. 1882, with interest thereon at the rate of ten per cent per annum, payable semiannually on the fifteenth day of October and April of each year, upon the presentation of the coupons therefor hereto attached. Both principal and interest payable at the American Exchange National Bank, in the city of New York. This bond is one of an issue of $10,000, made for the purpose of aiding in the building of a bridge across the Arkansas River at the town of Oxford, in the county of Sumner and State of Kansas, and in pursuance of an act of the legislature of the State of Kansas, entitled 'An Act authorizing the trustee, treasurer, and clerk, or any two of them, of the township of Oxford, in the county of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of $10,000, to aid in the construction of a bridge across the Arkansas River at Oxford, in said county and State, and to issue the bonds of said township in payment therefor,' approved March 1, 1872, and in pursuance of a vote of the qualified electors of said township, had at an election held therein, on the eighth day of April, A.D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140.

"The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest.

"In testimony whereof the township trustee, clerk, and treasurer of said township have caused this bond to be issued, duly certified, attested, and countersigned, this fifteenth day of April, A.D. 1872.

"GEORGE T. WALTON, *Trustee.*

"Attest: JOHN H. FOLKS, *Clerk.*

"Countersigned: T. E. CLARK, *Treasurer.*"

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that such bond has been duly registered in my office, in accordance with an act of the legislature,

entitled 'An Act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvements, and providing for the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872.

"Witness my hand and official seal, this twenty-fifth day of April, 1872.

"A. Thoman, *Auditor of State.*

{ Seal of Auditor of State. Kansas, April 25, 1873." }

"$25.] *Oxford Township.*

"On the fifteenth day of April, 1875, the treasurer of the township of Oxford, in the county of Sumner and State of Kansas, will pay to bearer the sum of $25, at the American Exchange National Bank in the city of New York, being the semiannual interest due on bond No. 1, issued April 15, A.D. 1872.

"George T. Walton, *Trustee.*

"Attest: John H. Folks, *Clerk.*"

The fifth and seventh sections of the act under which the bonds were issued are as follows:—

"Sect. 5. Before any of the bonds hereinbefore mentioned shall be issued, the question of issuing said bonds shall be submitted to the legal voters of said township, at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general election laws of this State. The time and place of holding said election shall be designated by the said trustee, treasurer, and clerk, or any two of them, by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in said township. The ballots to be used at said election shall be written or printed, 'For the bridge and bonds,' or, 'Against the bridge and bonds;' and if at said election a majority of said votes shall be for the bridge and bonds, the said bonds shall be issued, and not otherwise."

"Sect. 7. This act shall take effect from and after its publication in the 'Kansas Weekly Commonwealth.'"

"Approved March 1, 1872."

Annexed to the act is the following certificate:—

"I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the

same was published in the 'Kansas Weekly Commonwealth,' March 21, 1872.

"W. H. Smallwood, *Secretary of State.*"

The defendant demurred to the declaration, on the ground that it did not set forth a good cause of action. The demurrer was sustained, and judgment rendered for the defendant. The plaintiff sued out this writ of error.

Mr. Alfred Ennis for the plaintiff in error.

Mr. A. L. Williams, *contra.*

Mr. Chief Justice Waite delivered the opinion of the court.

A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as *bona fide* holders.

To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements.

The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the "Kansas Weekly Commonwealth." Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This

being the case, the law charges him with knowledge that the statute did not go into effect until that date.

The statute further provided that no bonds could be issued under its authority, until the question of their issue had been submitted to the legal voters of the town at an election, of which thirty days' notice had been given, and at which a majority of the votes should be in favor of the measure. These bonds bore date April 15, 1872, and, pursuant to the express requirements of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they were issued, and the result of the vote of the inhabitants on the question of their issuance, which is stated to have been taken April 8, 1872. No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true.

This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semiannual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain.

This disposes of the case. As the declaration sets out a copy of the bonds with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, it follows that the declaration does not set forth a good cause of action against the defendant, and that the demurrer was properly sustained. This is in accordance with the decision of the Supreme Court of Kansas, in *George* v. *Oxford Township*, 16 Kan. 72. Under these circumstances it is unnecessary to consider any other of the questions which have been certified here. *Judgment affirmed.*

STEWART v. SALAMON.

1. Where a promissory note for dollars, made in Georgia, in January, 1863, is shown to have been solvable in Confederate treasury notes, the sum thereby payable in actual money must be ascertained by the value in coin or legal currency of the United States, at the time when and the place where the note was made, of such treasury notes, equal in nominal amount to the number of dollars specified.
2. Where a payment is indorsed in the same monetary terms which are used in the note itself, the presumption is that it was intended to be credited in the same circulating medium. If the parties intended otherwise, some proof on the subject should be presented.
3. Accordingly, where a promissory note for dollars, shown to be solvable, at the time it was made, in Confederate treasury notes, had a receipt for a specified number of dollars indorsed upon it, it was *held* that, in the absence of proof, the principal designated on the face of the note was reduced only by the amount specified in the receipt.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Mr. Alexander H. Stephens for the appellants.
Mr. P. Phillips and *Mr. W. H. Phillips*, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an original suit in the Circuit Court of the United States, and was not transferred from the State court. The bill does, it is true, refer to two suits in the State court, — one at law, commenced by Mordecai, to foreclose, under the statute of Georgia, the same mortgage in controversy here; and the other in equity, commenced by Stewart against Mordecai, — both of which were transferred to the Federal court; but all that the bill asks with respect to them is, that the parties may be enjoined from their further prosecution, and be required to litigate with the complainants here. So far, then, as the present case is concerned, it does not matter whether the transfer from the State court of the two suits was before a trial or hearing was had in them, or after the judgments rendered had been reversed. There is no plea of other suits pending, nor any action asked with respect to the two suits mentioned, except as stated.

This case is brought to foreclose a mortgage executed by one James Stewart, now deceased, upon certain real property situ-

ated in the State of Georgia, to secure his promissory note for $44,000, and for the sale of the mortgaged premises to pay the amount due thereon. It does not differ from ordinary suits of foreclosure in equity, except in making tenants of the property parties, to prevent them, pending the litigation, from paying over rents to the administrator, or to the heirs of the deceased, among whom, it is alleged, the administrator has unlawfully partitioned the premises. The note of Stewart bears date on the 8th of January, 1863, and is payable to the order of Allen S. Cutts, in twelve months after date, with interest. It was made for the accommodation of Cutts, who indorsed it to Mordecai, to whom also the mortgage was executed, upon the purchase of certain bonds of the Georgia and Pensacola Railroad Company. In March, 1866, $15,325 were credited upon the note. Subsequently, the note and mortgage were assigned to the complainants. The point of contention is, whether the note was originally solvable in Confederate currency, or in the legal currency of the United States. The Circuit Court must have held that it was solvable in legal currency, and was so intended by the parties, for its decree is for the full amount claimed. In its ruling in this respect, we think the court erred. It seems to us that the evidence abundantly justifies the conclusion that the transaction, for which the note was in part given, was in Confederate currency. At the time the railroad bonds were purchased, Jan. 6, 1863, the treasury notes of the Confederate government constituted the principal currency of Georgia, in which business transactions were conducted. It was to them that reference was always made when dollars were mentioned, unless coin was specified. This condition of things appearing, the presumption is, that, in the purchase of the railroad bonds, the parties had those notes in contemplation. *Thorington* v. *Smith*, 8 Wall. 1; *The Confederate Note Case*, 19 id. 548; *Wilmington & Weldon Railroad Co.* v. *King*, 91 U. S. 3. And the testimony of Cutts, and of others cognizant of the transaction, except Mordecai, is positive that such was the case. The conceded facts respecting the transaction lead to the same conclusion. The value of the bonds was estimated at the time in Confederate currency; they were sold for eighty cents on the dollar in that currency. The cash payment of over $12,000

was in the same currency. The $50,000 note given at the time was paid a few months afterwards in that currency. It is highly improbable that an exceptional distinction was made with reference to the balance for which the note of Stewart was executed. Certainly, the presumption is strong the other way. The transaction and testimony together leave no doubt in our minds on the subject.

The sum, therefore, in actual money, which the note of Stewart represented, and which he promised to pay, must be determined by the value in coin or legal currency of the United States, at the time the note was made, and at the place where it was made, of Confederate treasury notes, equal in nominal amount to the number of dollars specified. And as the payment is indorsed on the note in the same monetary terms which are used in the note itself, the presumption is, that the payment was intended to be credited in the same scale of values. If the parties intended otherwise, some proof on the subject should have been presented. The credit was made without any explanation; and there is no evidence that the value of the dollars mentioned in the receipt was different from the value of the dollars mentioned in the note. As the matter is presented to us, the principal designated on the face of the note is only reduced by the amount specified in the receipt. The true rule, therefore, for ascertaining the rights of the parties in the case, is to calculate the interest on the principal of the note up to the time of the payment, and, having then deducted the payment, to treat the balance as the debt then due; the amount in money to be determined by the value in Georgia of Confederate notes in coin or the legal currency of the United States at the time the note was made. Interest should be calculated on this balance to the date of the decree. The note, with interest, amounted, when the payment was made, to $53,787; the credit of $15,325 reduced it to $38,462. This amount, scaled by the value of Confederate currency in Georgia at the date of the note, — three to one, — would make a balance due in lawful money, March 17, 1866, of $12,820. This amount, with interest, will constitute the sum which should be adjudged due, and for its payment the proceeds of the mortgaged premises when sold should be applied.

The decree of the Circuit Court must, therefore, be reversed, and the cause be remanded for further proceedings in accordance with this opinion; and it is *So ordered.*

NATIONAL BANK OF THE COMMONWEALTH v. MECHANICS' NATIONAL BANK.

1. A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit.
2. The interest being a liquidated sum at the time of the payment of the deposit, an action lies to recover it, and interest thereon.
3. The claims of depositors in a national bank at the time of its suspension for the amount of their deposits are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. Solicitor-General Phillips for the plaintiff in error.
Mr. William S. Opdyke, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This suit was brought by the defendant in error as an original claimant, and as the assignee of other parties.

All the claims have a common origin, and involve the same principle.

On the 22d of November, 1873, the Bank of the Commonwealth refused to pay its circulating notes on demand, and became in default. The comptroller of the currency appointed a receiver, and the bank has since been in his hands. The Mechanics' Bank and its assignors had funds on deposit. On the 24th of September, 1873, all the parties demanded payment. Nothing was paid. Instalments on account of the principal debts were subsequently paid from time to time to each of the parties. On the 20th of November, 1874, the last instalment was paid in each case, and the principal debts were thereby extinguished. At each payment, interest from the 24th of

September, 1873, on the amount so paid, was demanded and refused. The other parties assigned to the defendant in error their claims respectively for such interest. The Mechanics' Bank instituted this suit. The declaration demands the payment of this interest in all the cases, with interest upon the aggregate amount from the 20th of November, 1874. The Bank of the Commonwealth demurred. Judgment was given against it, and this writ of error was thereupon prosecuted.

Two errors are assigned.

1. That the plaintiff below was not entitled to recover any interest.

2. If interest was recoverable, as demanded, on each instalment when paid, the plaintiff was not entitled to interest on the gross amount of such interest from the 20th of November, 1874, the time when the last instalments of the principal were paid.

There is but one demurrer, and that is to the whole declaration. The point is, therefore, well taken by the counsel for the defendant in error, that if any part of the declaration be good, and divisible in its nature from the residue, the demurrer must be overruled. 1 Chitty's Plead. 664. But the view which we take of the case renders it unnecessary to apply this rule.

By the common law, interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Churchmen and laymen alike denounced it. Glanville, Fleta, and Bracton all speak of it in terms of abhorrence. The first English statute upon the subject was the 37 Hen. VIII. c. 9.

This statute fixed the lawful rate of interest at ten per cent per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to time, until finally an act of Parliament in 1854, 17 & 18 Vict. c. 90, swept all the usury laws in the English statute-books out of existence, and established "free trade in money." The first impulse to public opinion in this direction was given by Bentham, near the close of the last century. The final result was doubtless largely due to his labors.

The fiftieth section of the National Banking Act, 18 Stat.

113, requires the comptroller of the currency to apply the moneys paid over to him by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition? Sect. 996 of the Rev. Stat. p. 182, declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the States respectively where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. Rev. Code of N. Y. (ed. 1859), vol. iii. p. 637.

If these claims had been put in judgment, whether in a court of the United States or in a State court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence, they are within the equity, if not the letter, of these statutes, and bear interest as judgments would have done. Sedgw. on Constr. 311, 315. This is conclusive upon the first assignment of error.

The rule settled by this court as to the application of payment is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it after a controversy upon the subject has arisen between them, and *a fortiori* not at the trial. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *January*, 7 Cranch, 572; *Field* v. *Holland*, 6 id. 8. In the present case, the appropriation was made unequivocally by the party from whom the money was received. How it would have been applied by the law if neither of the parties had given any direction is a question which we need not, therefore, consider.

The interest lawfully accruing upon each of the claims was as much a part of it as the original debt. The creditor had the same

right to the payment of the one as of the other. If there had been a judgment, and the full amount due upon it had not been paid, an action of debt might have been brought upon it to recover the balance. 1 Chitty's Plead. 111.

Such balance would have been adjudged to the plaintiff with interest in the shape of damages for the detention of the debt. If, in that case, the judgment debtor had chosen to pay only the principal of the judgment, leaving the interest unsatisfied, and the suit had been for the balance, consisting of interest only, the same result would have followed.

We have shown that the claims, when proved to the satisfaction of the comptroller, were upon the same footing as if they had been in judgment. The amount in arrear was liquidated, and as certain as if it consisted wholly of principal instead of interest. This action was, therefore, well brought. If it had been in debt, damages would have been awarded for the detention of the debt sued for. The action not being in debt, the same amount was properly included in the mass of the damages for which the judgment was rendered.

The compounding of interest, so far as it has occurred, was due entirely to the fault of the agent of the plaintiff in error. The principle of estoppel *in pais* applies. No exception can be taken upon that ground.

The plaintiff in this action was entitled, *ex æquo et bono*, to the money sought to be recovered. Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable.

Kent, C. J., said upon this subject: "Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial. *Pearce* v. *Barbour*, 3 Caines, 265. See also *Robinson* v. *Bland*, 2 Burr. 1087.

In the latter case, Lord Mansfield said: "The interest is an accessory to the principal; and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it. . . . I don't know of any court in any country (and I have looked into the matter) which don't carry interest down to the last act by which the sum is liquidated."

The treasury authority fell into an error. There should have been no discrimination between principal and interest in making the payments. The creditor had the same right with respect to both as if he had been pursuing the defaulting debtor under other circumstances. The Comptroller should have done just what the law would have done if the case had not come under his cognizance.

Numerous cases, both English and American, are to be found in which compound interest, under special circumstances, was recovered. It is sufficient to refer to a few of them. *Ex parte Beavans*, 9 Ves. Jr. 223; *Coliot* v. *Walker*, 2 Anstr. 495; *Hamilton* v. *Le Grange*, 2 H. Black. 145; *Kellog* v. *Hickock*, 1 Wend. (N. Y.) 521; *Tyler* v. *Yates*, 3 Barb. (N. Y.) 222; *Aurora City* v. *West*, 7 Wall. 82; *Town of Genoa* v. *Woodruff et al.*, 92 U. S. 502.

The demand for the interest was properly made upon the plaintiff in error. *Judgment affirmed.*

CONRO *v.* CRANE.

Appeals do not lie to this court from the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt laws.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Northern District of Illinois.

Fox & Howard were adjudged bankrupts by the District Court for the Northern District of Illinois, June 5, 1875. Bradford Hancock was appointed provisional assignee, June 16; and, June 19, an order was entered in the bankruptcy proceedings, directing him to receive bids for the purchase of certain personal property belonging to the estate of the bankrupts, which had come into his possession. Under this order, bids were tendered by various persons, and, among others, one by Jefferson Hodgkins, for $40,000. All were reported by Hancock to the District Court, July 2, with the recommendation that the one of Hodgkins be accepted; and thereupon an order was made that all persons interested show cause by July 9 why this recommendation should not be complied with. Notice of this order

was given by mail and publication; and, on the day named, the bid was accepted, the sale approved, and Hancock authorized, on the receipt of the purchase-money, to execute an appropriate bill of sale, and deliver possession of the property. Hancock again reported, July 12, that, although demanded, the purchase-money had not been paid, and that he had received another bid from Conro & Carkin, the present appellants, for $40,500. He thereupon asked that the order of confirmation to Hodgkins be set aside, the sale revoked, and that he be authorized to sell and deliver the property to Conro & Carkin, at their bid. An order was made to this effect on the same day; and Hancock at once received the purchase-money, executed a bill of sale, and delivered the property to Conro & Carkin.

On the 18th of August, Hodgkins and Charles S. Crane, for whom, as is alleged, Hodgkins acted as agent in the purchase, filed their petition in the bankrupt court, asking that the order of July 12 be set aside, and Conro & Carkin, Hancock, and the bankrupts be directed to deliver the property to them, and account for the moneys realized by its use. Upon the filing of this petition, a rule was entered, requiring Hancock, Conro & Carkin, and the bankrupts to show cause by Aug. 27 why the order asked for should not be granted. Hancock and Conro & Carkin appeared in obedience to this rule, and answered. The matter was then referred to one of the registers in bankruptcy to take testimony; and, on the 6th of March, the District Court, upon full hearing, dismissed the petition. On the same day, Hodgkins and Crane presented to the circuit judge of the circuit their petition, under sect. 4986, Rev. Stat., for "the revision and reversal of the action of the District Court sitting as a court of bankruptcy." The Circuit Court, April 24, after hearing, reversed the order of July 12, and continued that of July 9 in force. The District Court was also directed to order the assignee to execute and deliver to Hodgkins the necessary papers to show title, and to cause the property to be delivered to Hodgkins or Crane. The District Court was also ordered to return to Conro & Carkin, subject to certain specified conditions, the purchase-money paid by them.

From this order an appeal by Conro & Carkin was allowed

to this court, which Hodgkins and Crane moved to dismiss for want of jurisdiction.

Mr. P. Phillips and *Mr. John S. Cooper* in support of the motion.

Mr. F. H. Kales in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It must now be considered as settled that appeals do not lie to this court from the decisions of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. In *Wiswall et al.* v. *Campbell et al.*, 93 U. S. 347, we held that "a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are . . . but parts of the suit in bankruptcy, from which they cannot be separated." And again: "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding." And in *Sandusky* v. *National Bank*, 23 Wall. 293, it was decided, that "any order made in the progress of the cause may be subsequently set aside and vacated, upon proper showing made, provided rights have not become vested under it which will be disturbed by the vacation."

These principles are decisive of this case. The rights of the parties grow out of a sale made by the court under the authority of sect. 5065, Rev. Stat. The bids were received by the provisional assignee; but the court determined which should be accepted, and gave directions as to the transfer of title. Clearly, then, what was done both as to the first and second sale was in the course of the bankruptcy proceeding, and part of that suit. As such, it was subject to revision in the Circuit Court under its supervisory jurisdiction.

Both Hodgkins and Conro & Carkin submitted themselves to the jurisdiction of the court to the extent that was necessary for the completion of their respective purchases. Conro &

Carkin were parties to the proceeding by which the sale to Hodgkins was set aside, and that to them made. Having been in court when the order under which their claim was made, they can properly be brought in to answer a motion to set it aside. Such a motion would not be a new suit, but a new proceeding in the old suit in bankruptcy, and therefore not subject to revision here upon appeal.

This was evidently the understanding of the parties at the time; for the original petition of Hodgkins and Crane was filed in the District Court sitting in bankruptcy, and the petition for review purports, on its face, to be filed under sect. 4986, Rev. Stat., which confers the supervisory jurisdiction.

Appeal dismissed.

MULLER v. DOWS.

1. A suit by or against a corporation in a court of the United States is regarded as brought by or against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the State which created it.
2. It should appear by the declaration, or bill of complaint, that the corporation was created by the State whereof the adverse party is not a citizen; but a defective averment of that fact may be cured by the subsequent pleadings.
3. A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each State, is, nevertheless, in Iowa, a corporation existing there under the laws of that State alone.
4. A decree, foreclosing a mortgage executed by the Chicago and South-western Railroad Company of its entire railroad and franchises, and ordering a sale of them, passed by the Circuit Court of the United States for the District of Iowa, which, in a suit there pending, had jurisdiction of the mortgagor and the trustees in the mortgage, is not invalid because a part of the property ordered to be sold is situate in the State of Missouri.
5. The court holds that there was no waiver by the Chicago, Rock Island, and Pacific Railroad Company of its right to foreclose the mortgage.
6. A surety, who holds several securities by way of indemnity, may resort to either of them for payment.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. Charles M. Da Costa for the appellants.

Mr. Thomas F. Withrow, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The decree made below is assailed here for several reasons. The first is, that the court had no jurisdiction of the suit, in consequence of the want of proper and necessary citizenship of the parties. This objection was not taken in the Circuit Court, but it is of such a nature, that, if well founded, it must be regarded as fatal to the decree. The bill avers that Dows and Winston, two of the complainants, are citizens and residents of the State of New York, and that Burnes, the other complainant, is a citizen and resident of the State of Missouri. The two original defendants, the Chicago and South-western Railway Company, and the Chicago, Rock Island, and Pacific Railroad Company, are averred to be citizens of the State of Iowa. Were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the Circuit Court jurisdiction of the case. In *The Lafayette Insurance Company* v. *French et al.*, 18 How. 404, a similar averment was held to be insufficient, because it did not appear from it that the Lafayette Insurance Company was a corporation; or, if it was, that it did not appear by the law of what State it was made a corporation. It was therefore ruled, that, if the defective averment had not been otherwise supplied, the suit must have been dismissed. A corporation itself can be a citizen of no State in the sense in which the word "citizen" is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is, therefore, necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen. Such an averment is usually made in the introduction, or in the stating part of the bill. It is always there made, if the bill is formally drafted. But if made anywhere in the pleadings, it is sufficient. In *The Lafayette Insurance Company* v. *French et al.*, *supra*, the defective averment of citizenship was held to have been supplied by the plaintiff's replication to the plea, which alleged that the defendants

were a corporation created under the laws of Indiana, having its principal place of business in that State. And, in the present case, we think the averment in the introduction of the bill, that the two defendant corporations were citizens of Iowa, which, if standing alone, would be insufficient to show jurisdiction in the Federal court, has been supplemented by other averments which satisfactorily show that the court had jurisdiction of the case. The bill in its stating part alleges that the Chicago and South-western Railway Company, of the State of Iowa, was organized by the adoption of articles of association in the manner provided by the laws of said State, and that, with all the powers, rights, and privileges granted and conferred on corporations by the then existing laws of the said State, it assumed to act. The articles of association are appended to the bill as an exhibit, and made part of it by proper reference. So are the articles of consolidation with a corporation of the same name of Missouri, in which the Chicago and South-western Railway Company in Iowa is recited to be a body politic and corporate, organized and existing under and by virtue of the laws of the State of Iowa. The averments of the bill were generally admitted in the answers of both the defendant companies. But this is not all. Throughout the pleadings, the corporate existence under the laws of Iowa of both the companies is either admitted or asserted by all the original parties, and by the appellants, who were made parties after the suit had been some time in progress. The petition of the appellants to be made parties adopted another petition, in which it was alleged that the Chicago, Rock Island, and Pacific Railroad Company was and is a corporation organized under and in pursuance of the laws of the States of Illinois and Iowa, and that the Chicago and South-western Railway Company was and is a corporation created under and by virtue of the laws of the States of Missouri and Iowa. Having been made parties, the appellants filed cross-bills against the present complainants and the two companies, in which they repeated the averments they had previously adopted; and the answer to the cross-bill made by all the defendants therein expressly admitted them. The record is thus seen to be full of showing that both the defendant corporations derived their existence as corporate bodies under the laws of Iowa, at least in part, and that they were corporations of that State.

Still, it is argued on behalf of the appellants that the Chicago and South-western Railway Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence, it is argued the corporation was created by the laws of Iowa and of Missouri; and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circuit Court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that any railroad company, organized under the laws of the State, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to "merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected." The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and South-western railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further. Doubt in regard to it is put at rest by the decision of this court in *Railway Company* v. *Whitton's Administrator*, 13 Wall. 270. There a similar question arose. A suit was brought by a citizen of Illinois in the State of Wisconsin, and it became a question whether the Federal Circuit Court of the latter State could entertain jurisdiction. The company, sued at first in the State court, resisted an application to remove the case into the United States Circuit Court, on affidavits that it was a corporation created by and existing under the laws of the States of Illinois, Wisconsin, and Michigan; that its line of railway was located, in part, in each of these States; that its entire line of railway was managed and controlled by the defendant as a single cor-

poration; that all its powers and franchises were exercised, and its affairs managed and controlled, by one board of directors and officers; that its principal office and place of business was at the city of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin. Nevertheless, the Circuit Court took jurisdiction of the case; and this court held correctly, remarking that "the defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its *status* or citizenship may be elsewhere." In view of this decision, it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable.

The next objection urged against the decree of the court below is, that it is void so far as it directed the usual foreclosure and sale of property not within the territorial jurisdiction of the court. A part of the Chicago and South-western Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. It also declared that after the sale both the defendant corporations and the complainants' trustees named in the mortgage, as well as all persons claiming under them or either of them, be barred and foreclosed from all interest, estate, right, claim, or equity of redemption of, in, and to the property, reserving, however, the rights of the holders of the bonds and coupons secured by the first mortgage, then remaining outstanding and unpaid. It directed that the two defendant corporations should surrender to the purchaser the property sold and conveyed, upon the execution, approval, and delivery of the master's deed; and that, as further assurance, the Chicago and South-western Railway Company should, on the approval and delivery of the master's deed, convey all the property therein described to the purchaser, by their good and sufficient deed.

If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State, — it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by

the agency of the trustees when they are complainants. In *McElrath* v. *The Pittsburg & Steubenville Railroad Co.*, 55 Penn. St. 189, — a bill for foreclosure of a mortgage, — in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made.

The next objection urged by the appellants is, that the bill for a foreclosure and all the proceedings therein were collusive. It is said the suit was instituted by collusion between the trustees and the Rock Island and South-western Railroad Companies, for the purpose of destroying the lien of the Atchinson branch bondholders on the main line of the South-western Railway, and to enable the Rock Island company to obtain the title to the main line, discharged from any lien or claim on the part of such bondholders. After careful examination of the evidence, we have failed to find any thing that justifies this objection. And certainly, if there was collusion in bringing and conducting the suit, the appellants have not been injured by it. They were permitted to come in as parties defendant, and they had full opportunity to assert their equities.

The fourth objection is general. It is, that, at the time of filing the bill, no right of foreclosure existed in favor of the complainant trustees for the benefit of the Chicago and Rock Island Railway Company, or, if such a right did exist, that it had been waived. In respect to this objection we have to

remark, that unless the right to a foreclosure had been waived by the Rock Island company, we discover no foundation for the assertion that there was no right of foreclosure when the suit was brought. That company had indorsed $5,000,000 of the bonds of the South-western company secured by the mortgage; and, in consequence of the indorsement, had paid coupons for interest of the bonds to a large amount. The mortgage stipulated that it might be foreclosed, in case of failure by the mortgagor to pay the interest; and it stipulated further, that in case the Rock Island company should, in consequence of its guaranty, pay any of the bonds or coupons, the mortgage might be foreclosed at their instance. The right to foreclose at the instance of the Rock Island company was expressly given. Was there any waiver of this right? We think not. It is said that the contract of July 27, 1871, coupled with the contract of Oct. 1, 1869, constituted a waiver. The contract first made preceded and contemplated the execution of the mortgage. It gave to the Rock Island company the option of furnishing the equipment for the South-western road, or to lease and operate it on such terms as might be agreed upon. Manifestly, this was for an additional security to the guarantors of the bonds, and not for a substituted security. And the contract of July 27, 1871, made between the Rock Island company and the South-western, merely provided that, with regard to the lease of the branch railroad proposed to be constructed by the latter to the Missouri River, opposite Atchinson, it should be used and operated by the Rock Island road in the same manner and on the same terms as the main line of the South-western. The meaning of this is, not that a lease existed, or should be taken, though one may have been contemplated, but that the branch road should be operated in the same manner and on the same terms as the main line might be. How this contract alone, or connected with the contract of Oct. 1, 1869, can be construed as a waiver of a right to sue for foreclosure of the mortgage on the main line, we are unable to comprehend. Nor can we see that the contract of Dec. 4, 1871, called a "lease contract," even if it be regarded as an executed and subsisting contract, can have such an effect. We have heretofore said that the agreement to give and take a lease, dependent on the option of the Rock

Island company, was intended as an additional security to that company for its indorsement of the bonds. If we are correct, a lease executed in pursuance of the agreement could be only cumulative security. Hence, it could be no waiver of the right to foreclose.

But, in fact, there was no lease, nor any agreement for a lease, that could be enforced specifically. The language of the agreement of Oct. 1, 1869, and that of the agreement of July 27, 1871, warrant no interpretation that makes them a lease in law, or in equity. The first, it is true, contemplated the possibility of a lease of the main line, if the terms could be agreed upon; and the latter provided that when such lease should be agreed upon, if ever, it should also embrace the branch line. But the terms never were agreed upon. On the thirtieth day of October, 1871, at a meeting of the executive committee of the Rock Island company, Messrs. Scott and Riddle were appointed a sub-committee "to agree upon the basis of a contract for a running arrangement between the company and the South-western, with directions to report to the general committee when an arrangement should be agreed upon." On the 4th of December, 1871, a proposition was submitted by that sub-committee to the officers of the South-western, and accepted by them. It was a proposition for a lease. But the sub-committee had no authority to agree for the Rock Island company to take a lease, and when, afterwards, they reported their action to the general committee, that committee refused to confirm it. It is vain, therefore, to contend that there was a lease, or any agreement for a lease, that can be enforced. And, even if there was, there is no evidence that one of its terms was that the rent should be sufficient for the payment, and should be applied to the payment of the Atchinson branch bonds.

It is next insisted on behalf of the appellants that the Rock Island company could not ask for a foreclosure of the mortgages until it had accounted for and applied the stock of the South-western company to its indemnification for its guaranty, for which purpose it held such stock as security. The company did hold a large amount of that stock. Whether it held it as an indemnity for the liabilities it had assumed, we do not care to inquire. Assuming that it did, the fact is quite

immaterial. It surely cannot be maintained that a surety who held several securities for his indemnity cannot use one of them because he has another to which he might resort.

The fifth particular in which the decree is alleged to have been erroneous is, that it denied the relief for which the appellants prayed in their cross-bill. That relief was the enforcement of what is called the lease contract of Dec. 4, 1871, or the enforcement of the contract of July 27, 1871, by a lease of the branch line, on terms and conditions to be derived from the contract of Oct. 1, 1869; that is to say, the rental to be paid by the Rock Island company to be an amount sufficient to guarantee the principal, or at least the interest, of the Atchinson branch bonds. The answer to this is what we have heretofore said. There was no lease, nor any contract which bound the Rock Island company to take a lease, much less to pay a rental sufficient to guarantee the principal or interest of the Atchinson branch bonds, or to apply the rent to the payment of that principal or interest.

The appellants also, in their cross-bill, prayed in the alternative that the bonds of the branch road, held by them, might be deemed to have been obtained under false and fraudulent pretences, and that the proceeds thereof were paid out by the Rock Island company knowingly, fraudulently, and in violation of a trust assumed by them, and that the said company might be decreed to pay to them the par value of the same and interest.

We have sought in vain for any evidence that would justify a decree that the Rock Island company obtained the bonds of the branch road by fraudulent pretences, or that it knowingly, fraudulently, and in violation of any trust assumed by it, paid out the proceeds of sale of the bonds. By the provisions of the branch mortgage the Rock Island company was made the custodian of the bonds, with power and direction to pay them and their proceeds to the president or other duly authorized agent of the South-western company, in three contingencies: First, upon the delivery of an invoice of articles purchased, approved by the president; second, upon the presentation of monthly estimates by the engineer of the South-western of work done and materials fur-

nished in the construction of the branch railway, approved in the same manner; and, third, on the certificate of the same engineer, approved in like manner, that the road had been completed and was in running order. If this constituted a trust, it was only that of a custodian. The Rock Island company had no right to control the location of the branch road, or the cost of its construction. It was not its duty to supervise the contracts or direct the alignment. Such action would have been outside of its corporate power. If some persons who were its officers undertook to control the expenditure in such a manner as to secure a proper location and construction of the road (of which we discover no sufficient evidence), those persons may be responsible for their breach of duty, if there was any. But no such trust was assumed by the Rock Island company. Certainly, then, there was no undertaking that the branch road should be fifty miles long; and, if it was imperfectly constructed, it appears that the Rock Island company has expended upon its construction a very large sum of its own money, and has made it a first-class Western road. If, then, there was such a trust, as is charged by the appellants, and a breach of it, full compensation has been made, and the appellants have all the security the trust was intended to give them; *i.e.*, a first mortgage upon a finished first-class road.

The last objection to the decree is, that the relief prayed for by the cross-bills of the two defendant railroad companies should not have been granted, for the following reasons: 1st, If the original suit fails for want of jurisdiction, so must the cross-bills. 2d, The cross-bills were nullities, because filed without leave of the court, and because not making the intervening bondholders parties. 3d, Because collusive. We have seen the court had jurisdiction of the original suit. The permission of the court to file the cross-bills must be presumed from its action upon them, and the intervening bondholders were not parties or necessary parties when the bills were filed. They became parties to the original bill, but they did not ask to be made parties to the cross-bills of the defendant corporations. That the cross-bills were collusive in their origin, purpose, and conduct, if such was the fact, which we do not perceive, is of no importance, since the appellants had an unobstructed opportu-

nity to vindicate their rights. They might, if they had chosen, have become parties defendant to the cross-bills, and, if they had, they could not have resisted the relief given by the court.

The appellants are, no doubt, unfortunate. It may be that they purchased their bonds expecting that the Rock Island company would protect them, either by taking a lease of the branch road, or by holding the purchase-money of the bonds and expending it for their security. But the expectation of a guaranty cannot be treated as a guaranty itself. *Decree affirmed.*

EX PARTE SMITH.

There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them.

PETITION for a *mandamus* to the Circuit Court of the United States for the Western District of Tennessee.

Mr. S. P. Walker and *Mr. Thomas H. Sneed*, for the petitioners.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The relators, citizens of the State of Tennessee, sued Lewis Anderson, also a citizen of that State, Dec. 31, 1873, in the Circuit Court of the United States for the Western District of Tennessee, to recover possession of certain lands in that district to which they claimed title in fee through a certificate of the United States direct tax commissioners, under the "Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7, 1862, 12 Stat. 422. The declaration is as follows: —

"The plaintiff sues the defendant to recover the following tract of land, lying in Shelby County, district No. —, and bounded as follows: Lots Nos. two (2), three (3), four (4), and sixteen (16), Cannovan's subdivision, sixty by one hundred and sixty (60 by 160) feet, assessed to W. H. Bowers in 1860, containing ———, of which the plaintiff was possessed, claiming in fee, through a certificate of the United States direct tax commissioners, Jno. B. Rodgers, E. P.

Ferry, and Delia F. Smith, ——, under an act of Congress entitled an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes, and the acts amending the same, on the 1st of January, 1865; and after such possession accrued, the defendant, on the first day of December, 1865, entered thereupon, and unlawfully withholds and detains the same, together with $5,000 due for detention thereof."

Summons was served April 24, 1874, and, June 12, Anderson moved to dismiss the suit for want of jurisdiction, as the parties were all citizens of Tennessee. This motion was granted March 1, 1877; and the value of the property in dispute being, as is alleged, less than $5,000, Smith and Hurst now ask for a *mandamus* requiring the Circuit Court to take jurisdiction, and hear and determine the cause upon its merits.

Jurisdiction is claimed for the Circuit Court under sect. 2 of "An Act further to provide for the collection of duties on imports," approved March 2, 1833, 4 Stat. 632, which provides "that the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law."

The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions.

In this case, the jurisdiction is claimed on account of the subject-matter of the action, and not on account of the citizenship of the parties. It was incumbent on the relators, therefore, to show, in their pleadings or otherwise, that this action arose under the revenue laws of the United States. This they failed to do. They do show that they claimed title through such laws, but not that their title in that respect is disputed. For all that appears, Anderson may admit their title, and still contest their right to possession as against him. He may be their tenant, or he may be their grantee. There are no presumptions in favor of the jurisdiction of the courts of the United States.

The suit was therefore properly dismissed, and we cannot compel the Circuit Court to take jurisdiction.

Petition dismissed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. SCHAEFER.

1. Within the scope of the professional employment of an attorney, the communications made to him by his client are privileged, and, without the consent of the latter, he should neither be required nor permitted by the courts of the United States to testify concerning them.
2. A policy of life insurance originally valid does not cease to be so by the cessation of the assured party's interest in the life insured, unless such be the necessary effect of the provisions of the instrument itself. *So held*, where, subsequently to effecting an insurance by husband and wife, upon their joint lives, payable to the survivor on the death of either, they were divorced *a vinculo matrimonii*, and she, having thereafter paid the premiums to the time of his death, brought suit on the policy.
3. Any person has a right to procure an insurance on his own life, and assign it to another, provided it be not done by way of cover for a wager policy.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The facts are set forth in the opinion of the court.

Mr. Edgar M. Johnson for the plaintiff in error.

Mr. J. D. Brannan, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Franzisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced, and alimony was decreed and paid to the wife. There was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Franzisca, the survivor.

On the trial of the cause, several exceptions were taken by the defendant to the rulings and charge of the court, and this writ of error is brought to reverse the judgment for alleged error in said rulings and charge.

The first exception was for overruling certain testimony offered by the defendant. The plaintiff, having offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to

him, to be embodied in the petition, that Schaefer had been a habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact, it would have falsified the statement made in the application for insurance.) The defendant called Harris, and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled, as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because, by the law of Ohio, such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the State are only to be regarded as rules of decision in the courts of the United States where the Constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where Congress has declared the rule, the State law is silent. Now, the competency of parties as witnesses in the Federal courts depends on the act of Congress in that behalf, passed in 1864, amended in 1865, and codified in the Revised Statutes, sect. 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which Congress deemed necessary are expressed in the act of Congress; and the admission in evidence of previous communications to counsel is not one of them. And it is to be hoped that it will not soon be made such. The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.

The other exceptions were to the charge of the court, and

relate to two points: first, to the forbearance note given for a portion of the last renewal premium; and, secondly, to the alleged failure of interest of the plaintiff in the policy, caused by the divorce of the insured parties.

First, as to the forbearance note. Only one half of the annual premium was required to be paid in cash; the insured, if they chose, could have a credit for the other half. This credit was given upon the assured's signing an acknowledgment in the following form: "I hereby acknowledge a credit or forbearance of —— dollars of the premium on my policy No. ——, which amount shall be a lien on said policy at six per cent per annum until paid or adjusted by return of surplus premium." It was not a note promising to pay money, but a form of acknowledgment by which the assured consented to a deduction from the policy for non-payment of a portion of the premium. As long as George F. Schaefer took any interest in the policy, he signed this acknowledgment for himself and wife, "George F. and Franz. Schaefer;" or for himself alone. One premium became due after the divorce, and Franzisca Schaefer herself attended to the payment of it, — paying the cash portion, and authorizing her son by a former marriage to sign the forbearance note, as it is called. He did so in the name of both parties insured, thus: "Geo. F. & F. Schaefer." The company accepted it. On what valid ground they can now object to the transaction, it is difficult to see. A joint act was to be done. Only one of the parties could physically do it. Either had a right to do it. This act was, to pay or settle the annual premium. The plaintiff, as one of the joint parties, performed what was necessary to be done. George F. Schaefer could not complain; for it was done in his interest, keeping the policy alive for his benefit as well as Franzisca's. The company could not complain; for they accepted both the money and the acknowledgment in the form in which they were given. There is no pretence that any deception was practised upon them.

This point is really frivolous.

The other point, relating to the alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it.

It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies — that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction — are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance: first, with regard to marine risks, by statute of 19 Geo. II. c. 37; and next, with regard to lives, by the statute of 14 Geo. III. c. 48. In this country, statutes to the same effect have been passed in some of the States; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice Shaw, in a case which arose

in Connecticut (in which State the present policy originated), seem to us characterized by great good sense. He says: —

"In discussing the question in this Commonwealth (Massachusetts), we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III., passed about the time of the commencement of the Revolution, and never adopted in this State. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt," he continues, "that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." *Loomis* v. *Eagle Life Insurance Co.*, 6 Gray, 399.

We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject. See May on Insurance, sects. 102–111; Bliss on Life Insurance, sects. 20–31.

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the

insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them.

In England, by the operation of the statute of 14 Geo. III., as construed by the courts, the law has assumed a very definite form. In a lucid judgment delivered by Baron Parke in the Exchequer Chamber, in the case of *Dalby* v. *Life Insurance Company*, decided in 1854, 15 C. B. 365, it was held that the true meaning of the statute is, that there must be an interest at the time the insurance is effected, but that it need not continue until death; the words of the statute being, "that no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaming or wagering," and "that in all cases where the insured hath interest in such life, &c., no greater sum shall be recovered than the amount or value of the interest." The word "hath" was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amount insured.

as required by the principles of life assurance. This case overruled the previous case of *Goodsall* v. *Boldero*, 9 East, 72, decided by Lord Ellenborough, in which, proceeding upon the idea that life insurance is a mere contract of indemnity, it was held that the interest must continue until death, and even until the bringing of the action. Baron Parke, in commenting upon this case, very justly says: —

"Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a mere contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought; and his lordship relied upon the decision of Lord Mansfield in *Hamilton* v. *Mendes*, 2 Burr. 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an assurance for life: it really is what it is on the face of it, — a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute."

As thus interpreted, we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision.

Be this, however, as it may, in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured.

Judgment affirmed.

HOWELL v. WESTERN RAILROAD COMPANY.

1. Where a railroad company issues its bonds, and mortgages its property to secure the payment of them and of the semiannual instalments of interest thereon, as they respectively fall due, under the authority of an act of the legislature, which declares that the bonds shall not mature at an earlier period than thirty years, a provision in them, that, upon a failure to pay any coupon thereto attached, when presented at the place of payment, and a continued default thereon for six months, the whole sum mentioned in the bond shall become due and payable, is void.

2. In such a case, the mortgage may provide that it shall be foreclosed upon non-payment of interest. When suit in foreclosure is brought, if the sum ascertained to be due on the coupons be paid within such reasonable time as the court shall appoint, no further proceedings in the suit can be had until there is another default; if the sum be not so paid, a sale of the property, with a foreclosure of all the rights subordinate to the mortgage, should be ordered, with a direction to bring the proceeds into court, when, in distributing them, the sums secured by the mortgage must be protected, according to their respective priority of lien.

APPEAL from the Circuit Court of the United States for the Eastern District of North Carolina.

Mr. A. S. Merrimon for the appellant.

Mr. W. N. H. Smith, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant in this suit is the owner of five bonds of $1,000 each, issued by the defendant corporation, and he seeks the foreclosure of a mortgage on the railroad and its appurtenances given to secure their payment. These are part of an issue of like bonds to the amount of $900,000, made at the same time, to wit, Oct. 31, 1870, payable thirty years after date, with coupons for interest attached, at the rate of eight per cent per annum.

Very few of these bonds were ever sold or put into circulation. All that have been, except these held by plaintiff, have either been taken up or are under the control of the company. The face of each bond contained a provision, that, on the failure to pay any coupon when presented at the place of payment, and continued default thereon for six months, the whole sum mentioned in said bond became due and payable, and the mortgage deed contained a provision that a like failure as to any one coupon of any single bond should make all the bonds become due and payable.

On the back of each bond was printed the act of the legislature of North Carolina, which authorized the corporation to make these mortgage bonds, which declares that "said president and directors are hereby authorized and empowered to issue the mortgage bonds of said company in sums of not less than $100 each, and not exceeding in amount $900,000, and to be negotiated at not less than par, and not to mature at an earlier period than thirty years," &c.

Many issues are raised by the pleadings, which are not necessary to be considered here. We shall confine ourselves to two questions, which are all that we deem appropriate to our purpose. The first of these is, whether the plaintiff is a *bona fide* holder for value of the bonds on which he sues. There is some reason to infer that Rogers, who was one of the trustees of the mortgage, and the banker who was expected to negotiate the bonds, and with whom they were deposited, was not a rightful holder of them, though it is asserted that they were paid to him for services to be performed as trustee in the mortgage. He, however, never performed any services, no bonds were ever negotiated, and the arrangement by which he held these bonds as his own does not appear to have been authorized or approved by the board of directors of the company.

This, however, is immaterial; for, from the testimony before us, we are compelled to hold that Howell, the complainant, was a *bona fide* purchaser of them for value of Rogers, without notice of any defect in his title. The only evidence on this subject found in the record is his own deposition, in which he states unequivocally that, on a settlement made by him with Bayne & Co., who were his bankers, he took these bonds in absolute payment of money due him, at the rate of seventy-five cents on the dollar, and had no notice of any thing wrong in the title of Rogers. This testimony is uncontradicted and conclusive.

The other question relates to the validity of the bonds as affected by the provision of the statute, that they should not mature at an earlier period than thirty years, whereas the bonds provide that on failure to pay a single interest coupon they shall mature in six months thereafter, if it is still unpaid. The provision was, as we have said, printed on the back of the bond, and imparted to every purchaser or holder of it the fullest notice of its nature.

The provision, in our opinion, differs widely from a mere direction as to the length of the time the bonds should run or the period when they should be made payable.

Such a direction or provision in an act authorizing a corporation to issue bonds is not in general inconsistent with a contract that, if the interest is not paid as agreed, the holder may treat

the whole sum as due. The language of this statute is not that these bonds are to be made payable in thirty years, or payable at a given time, and there is no direction as to the terms in which that is to be expressed. They may be made to run fifty or a hundred years; but however worded or expressed, they are "not to mature at an earlier period than thirty years." We construe this as an express enactment that they shall not mature earlier. No matter what device the parties interested may resort to, nor what form of language may be inserted in the bond, the principal sum of the bond shall not become due until the expiration of that period. The legislature had an undoubted right to annex to the power which it conferred of making these mortgage bonds this absolute condition, and they have used language which we can construe in no other way.

We do not see how a condition of the contract by which the bonds can be made to mature in one year can be valid, when the only authority to make the contract at all is the statute we have cited. But while this condition is invalid, it does not avoid the remainder of the contract, which is complete without it, and the agreement to pay interest semiannually is specifically authorized by the statute.

The company, therefore, had a right to mortgage their property for the payment of these instalments of interest as well as principal, and to make it one of the provisions of the mortgage, that it might be foreclosed if these instalments were not paid as they fell due. There can, in fact, be but one decree of foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of the Court of Chancery, that all the sums secured by that mortgage must be protected according to their priority of lien.

We are of opinion, then, that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons.

For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice, — a decree which will ascertain the sum so due, and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged

property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase-money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal.

In this manner full justice will be done the appellant, and no wrong to the appellees.

Decree reversed, and the case remanded with directions to proceed in conformity to this opinion.

HINCKLEY v. GILMAN, CLINTON, AND SPRINGFIELD RAILROAD COMPANY.

Where, in the progress of a suit for the foreclosure of a mortgage, a receiver was appointed, against whom, after the foreclosure and sale of the mortgaged premises, a decree was rendered directing him to pay into court $18,776.25, the balance found due from him on the settlement of his accounts, — *Held*, that he had the right to appeal from that decree.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Southern District of Illinois.

In the progress of a suit for the foreclosure of a mortgage executed by the Gilman, Clinton, and Springfield Railroad Company, Francis E. Hinckley was appointed receiver. On the 8th of April, 1876, a final decree was rendered, under which, on the 10th of June, the mortgaged property was sold, and subsequently conveyed to the purchasers. Upon a settlement of the accounts of the receiver, a balance was found due from him of $18,776.25, for which a decree was entered Sept. 27, directing its payment into court on or before Oct. 10. On the 9th of October he prayed this appeal "from the decree against him," which was granted. The complainants now move to dismiss, for the reason that he was not a party to the suit.

Mr. R. Biddle Roberts in support of the motion.

The appellant is not a party to the suit, and cannot be. Being merely the officer or representative of the court, without any personal interest whatever in the litigation, the right to discharge him rests with the court, at any stage of the controversy; and from the exercise of this right he cannot appeal. High on Receivers, 536; *In re Colvin*, 8 Md. Ch. 300; *Ellicott* v. *Warford*, 4 Md. 80. Only those who are parties to the record can sue out a writ of error. Phillips's Practice, p. 64, and cases there cited. The same rule applies to appeals. Id. p. 65. On the eighth day of April, the final decree was entered, from which an appeal was not prayed, nor could it, in the following October, be taken, much more than sixty days having then elapsed. *Kitchen* v. *Randolph*, 93 U. S. 86. The decree of Sept. 27, requiring the payment of money into court, was merely interlocutory, transferring the possession of property in litigation. The rule of finality cannot apply to it. *Forgay* v. *Conrad*, 6 How. 201. This doctrine is sustained by *Thomson* v. *Dean*, 7 Wall. 342; *Railroad Company* v. *Bradley*, 7 id. 577; *Stowall* v. *Banks*, 10 id. 588; and it would seem to be the settled law in this court.

Mr. H. Crawford and *Mr. S. P. McConnell*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The motion to dismiss cannot be sustained.

In *Blossom* v. *Railroad Company*, 1 Wall. 655, a bidder at a foreclosure sale was allowed to appeal, and in delivering the opinion of the court Mr. Justice Miller said: —

"It is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect."

This seems to us to be decisive of this motion. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. In this case, the final decree has been given, and the case is properly here upon the appeal as prayed and allowed. This will not keep any thing in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. Every thing can be closed up in the court below, in accordance with the decree which has been entered in the cause, except the distribution of the money claimed from the receiver.

It will be time enough to consider whether more of the record has been brought here than is necessary to the hearing of the questions presented by the appeal when the cause is reached, or when application is made to us in that behalf.

Motion to dismiss denied.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY v. KELLOGG.

1. As the effect of the statute of Iowa is to make an occupant of land in that State, who, under color of title thereto, and in good faith, has made valuable improvements thereon, the owner of the improvements, the question as to the ownership of the land is immaterial in an action to recover for their wilful or negligent destruction.
2. Where the subject of a proposed inquiry before a court is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions.
3. The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances.
4. A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the

injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.

5. The finding of the jury in this case, that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendants' elevator, which had been caused by their negligence, is, in effect, a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff.

ERROR to the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. John W. Cary for the plaintiff in error.

Mr. Myron H. Beach, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in the occupation of it, believing he had a right to be there."

Such having been the admissions, the court refused to allow

the parties to try the title to the land upon which the mill and lumber had been placed, proof of title being, in the opinion of the court, immaterial. To this ruling the defendants excepted, and it is the first error they have assigned. We are unable to perceive any reason why the proof offered was not, as the Circuit Court held it to be, perfectly immaterial to the issue between the parties. By the law of the State of Iowa, "where an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards, in a proper action, found not to be the rightful owner thereof," he is entitled to payment or credit for the value of his improvements. Code of Iowa, sects. 1976–1981. The effect of this statute is to make such an occupant practically the owner of his improvements, even though he be not the owner of the land on which they have been made. If, therefore, the title to the land had been shown to be in the defendants, the proof would not have affected the right of the plaintiff to recover compensation for wilful or negligent destruction of the buildings and lumber. Nor could it have changed the degree of prudence and care which the defendants were bound to exercise in order to guard against injury to that property. The plaintiff is not to be regarded as a mere trespasser, wantonly thrusting himself or his property in the way of danger, — a trespasser to whom the defendants owed a less degree of caution than would have been due if he had been the undisputed owner of the fee-simple of the land on which the mill stood. We cannot admit that the defendants owed no duty to the plaintiff, even if he was occupying their land without their consent. An attempt was made during the argument to maintain that they had been found by the jury guilty only of an act of omission, and it was insisted that such an act would not give a right of action to the plaintiff if he was wrongfully in possession of their land. Neither the fact asserted nor the inference drawn from it can be conceded. The verdict of the jury was, 1st, That the elevator was burned from the steamer "Jennie Brown;" 2d, that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and, 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator.

The only reasonable construction of the verdict is, that the fault of the defendants — in other words, their want of ordinary care and prudence — consisted in landing the steamer at the elevator in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, of want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred, that, while the wind was blowing a gale from the steamboat towards and in the direction of the elevator, the defendants carelessly and negligently allowed, permitted, and counselled (or, as stated in another count, "directed") the steamboat to approach and lie alongside of or in close proximity to the said elevator. This is something more than nonfeasance: it is positive action, the result, consequence, or outworking, as the jury have found it, of the want of such care as should have been exercised.

It has been further argued in support of this assignment of error that the proffered proof of title should have been admitted, because it tended to show contributory negligence on the part of the plaintiff. But we cannot understand how it could have had any such tendency. Whether the mill stood on the defendants' land, or on other land equally distant from the steamer and elevator, and in the same direction, its exposure to the fire was exactly the same.

A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment.

In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus, it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, *Keller* v. *Railroad Company*, 2 Abb. (N. Y.) App. Dec. 480; or whether it was prudent to blow a whistle at a particular time, *Hill* v. *Railroad Company*, 55 Me. 438. Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. *Muloy* v. *Insurance Company*, 2 Gray (Mass.), 541. In *Durell* v. *Bederly*, Chief Justice Gibbs said: "The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence." Powell's Evid. (4th ed.) 103. And in *Campbell* v. *Richards*, 5 Barn. & Ad. 846, Lord Denman said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than in another." See also Lord Mansfield's opinion in *Carter* v. *Boehm*, 3 Burr. 1905, 1918, 1914, and *Norman* v. *Higgins*, 107 Mass. 494, in which it was ruled, that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land, was inadmissible.

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof

submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York Central Railroad Co.*, 35 N. Y. 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown, & Ogdensburg Railroad Co.*, 49 N. Y. 420, and *Pennsylvania Railroad Co.* v. *Hope*, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & North-western Railroad Co.*, 26 Wis. 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass. 414; *Higgins* v. *Dewey*, 107 id. 494; *Tent* v. *The Toledo, Peoria, & Warsaw Railroad Co.*, 49 Ill. 349.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place.

2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be

seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

STARK v. STARR.

1. The complainant, Starr, and his brother, being in possession of certain lots in the city of Portland, Oregon, filed a bill in equity in the State court to quiet their title and compel the defendant, who claimed an adverse interest under his patent from the United States, to execute a release to them. Their bill set forth two distinct and independent causes of action, or grounds for relief: one, founded upon an agreement made by the defendant with the parties through whom the complainants claimed, to ratify and confirm the title of such parties; and the other, founded upon a patent of the United States, issued to the city of Portland for land within its limits, in trust for the several use and benefit of the occupants thereof. This patent embraced the premises in controversy, and the complainants claimed as beneficiaries under it. On motion of the defendant, the court held that the two grounds for equitable relief were inconsistent, and compelled the complainants to elect upon which ground they would proceed. They objected to the order, but, under its compulsion, elected to proceed under the city patent, and accordingly amended their bill so as to present their claim for relief solely as beneficiaries under that instrument. The State court held that the patent to Stark was void as against the complainants, and decreed in their favor. On appeal to the Supreme Court of the United States, the decree was reversed, that court holding that the patent to the city was void; and the bill was subsequently dismissed. The defendant having afterwards commenced an action of ejectment for the possession of the premises, and recovered judgment, the complainant, who had in the mean time acquired the interest of his brother, filed the present bill, setting up substantially the same matter respecting the agreement of Stark with the parties through whom he claimed which was originally averred in the first suit, and also that the defendant was estopped by his acts from asserting title to the premises. *Held*, that the proceedings and decree in the first suit did not conclude the complainant in the present suit upon the agreement.
2. The principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or the proofs, or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail, does not require distinct causes of action; that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time, and might be considered together.
3. Before the laws of the United States were extended over the Territory of Oregon, the settlers in that country had formed for themselves a provisional government, under which they adopted regulations for the possession and occupation of land in the Territory among themselves, although the title to the land was in the United States. Under the regulations, land was occupied, cultivated, and improved, and bought and sold, as if the parties had possessed the fee. The claimants did not, in their dealings with the land, deny the pro-

prietorship of the United States, but they acted upon the expectation that their possessions and improvements would be respected by the government, and that ultimately they should acquire the title; and it was the general understanding of the people, that, whenever the legal title was obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States. This understanding affected all transactions in land until the passage of the Donation Act of Sept. 27, 1850. *Held*, that a purchaser under these circumstances from the claimant, or a person whose purchase from another had been confirmed by the claimant, acquired as against him an equitable right to the land which a court of equity will enforce when he has obtained the patent of the United States; and this equitable right passes to subsequent grantees of the first purchaser or confirmee.

4. Where a ratification by an attorney of a deed of settlement is insufficient in form, because of the manner in which he expressed his agency in appending his signature to the instrument declaring the ratification, a court of equity will look beyond the form of the execution, and, having ascertained his intention in signing the instrument, will, if possible, give it the effect intended, if such ratification has been acted upon by others, and has not been objected to by the principal, when called to his attention.
5. The subsequent action of the principal in asserting a right in severalty to property, which he could only do upon his approval of such ratification by his attorney, will estop him from denying the ratification.

APPEAL from the Circuit Court of the United States for the District of Oregon.

This was a suit in equity, to restrain the defendant from enforcing a judgment recovered by him against the tenants of the complainant, for the possession of certain premises situated in the city of Portland, Oregon, and to compel the defendant to execute a release of his interest to the complainant.

It appears from the record, that on the 22d of March, 1848, and for some time previous, one Francis W. Pettygrove held a claim to six hundred and forty acres of land in Oregon, which was taken up by him under the law of the provisional government, established by the settlers there in 1845, before the laws of the United States were extended over the country. On the land covered by this claim a large part of the city of Portland is built. On the day mentioned, Pettygrove conveyed his claim, with the exception of certain designated lots, to one Daniel H. Lownsdale, of Portland. By the conveyance, the grantor, for the consideration of $5,000, and divers other good causes and considerations, bargained, remised, and released to the grantee named all his "right, title, interest, claim, and

demand at law and in equity, present and in expectancy," in and to the land claim, the boundaries of which were given.

On the 30th of March, 1849, Lownsdale, for the consideration of $6,000, bargained, quitclaimed, and released his interest in the claim, with the exception of certain lots, to Stephen Coffin, designating the interest conveyed, and describing the claim in similar language. With the execution of this conveyance, Lownsdale and Coffin entered into a contract by which Coffin agreed to make every exertion to obtain the title of the United States to the claim, divide the proceeds of any sales of lots or other property or privileges on the land claimed; to bear half the expenses of any improvements they might jointly conclude to make; to further the interest of the town site; to divide the profits and the losses; and that Coffin should execute to Lownsdale a good title to one-half of the claim upon the termination of the contract, which was dissolvable by mutual consent.

On the 13th of December, 1849, Lownsdale and Coffin, for the consideration of $26,666, payable by instalments, conveyed one undivided third part of the claim to William W. Chapman, of Portland. From that time the three parties owned the claim jointly, designating themselves as partners.

During this time, the defendant Stark asserted ownership to one undivided half of the claim, by purchase from one Lovejoy, who, he contended, had held the claim in connection with Pettygrove.

In January, 1850, Lownsdale went to San Francisco, leaving with Chapman a power of attorney to transact and superintend his business in the Territory during his absence; to do any thing pertaining to his interests in Oregon which he, in his judgment, might think advisable, "particularly in signing deeds to Portland lots."

At San Francisco Lownsdale met Stark, and they made a settlement of their respective claims, by which the claim was divided by a line running through what is now called Stark Street; Stark taking the part north of the line, and Lownsdale the part south of it. This settlement was embodied in a deed of release and quitclaim, executed by them on the 1st of March, 1850. By the deed, Stark ratified and confirmed the

conveyances of certain designated lots north of that line, made by Lownsdale or his attorney, previous to the first day of January, 1850, and also all grants and conveyances made subsequently to the first day of March, with a proviso that Stark should receive the proceeds of the subsequent conveyances.

During the absence of Lownsdale, Chapman and Coffin agreed to partition off three blocks among the three owners, assigning one to each owner in severalty, at an agreed valuation. In this way, block 78 was assigned to Lownsdale, block 79 to Coffin, and block 81 to Chapman. This partition, making assignment, was made by the following instrument: —

"This indenture, made and entered into this twentieth day of March, A.D. 1850, between Stephen Coffin, D. H. Lownsdale, and W. W. Chapman, proprietors of Portland, of the first part, and W. W. Chapman, of Portland, Washington County, Oregon, of the second part, witnesseth, that the party of the first part, for and in consideration of the sum of $2,000, the receipt whereof is hereby acknowledged, doth release, confirm, and quitclaim unto the said Chapman the following-described property in the said town of Portland, to wit, lots numbers one (1), two (2), three (3), four (4), in fractional block number eighty-one (81), being the warehouse fraction, and situate east of Water Street, to the water north of Oak Street and south of Pine Street, according to the plat of said town.

"In testimony whereof, the parties have hereunto set their hands and seals day and year aforesaid.

(Signed) "S. COFFIN. [SEAL.]
"D. H. LOWNSDALE, [SEAL.]
"*By his Attorney-in-fact, W. W. Chapman.*
"W. W. CHAPMAN. [SEAL.]"

Chapman and Coffin first heard, early in April, 1850, of the settlement between Stark and Lownsdale. They at once refused to ratify it, unless the agreement or deed of settlement was modified so as to cover the disposition of property made by them during Lownsdale's absence up to the time they were informed of the settlement.

Stark had left Portland in September of the previous year. Before he left, he executed the following power of attorney, and delivered it to John H. Couch: —

"Know all men by these presents, that I, Benjamin Stark, merchant, resident of Portland, in the Territory of Oregon, do hereby make, constitute, and appoint John H. Couch, of Portland aforesaid (merchant, and my mercantile partner), my true and lawful attorney, for me, and in my stead, to do any and all acts, during my temporary absence from this Territory, which I might myself lawfully do were I personally present, hereby ratifying and confirming all and every act which my said attorney shall so perform, and, by these presents, recalling and annulling all authority conflicting with this letter of attorney, which I have previously given to any person or persons whatsoever.

"Witness my hand and seal, at Portland, this twenty-sixth day of September, A.D. 1849.

"BENJ. STARK. [SEAL.]

"Witness: WM. SETON OGDEN."

With this power, Stark sent the following letter to his attorney: —

"JOHN H. COUCH, Esq.:

"SIR, — With this you have from me a power of attorney of the fullest character, under which, during my absence from the Territory, you can look out for all my interests, particularly with reference to my interest in the Portland town claim.

"As regards the claim, I wish you to notify Mr. Coffin, as soon as he returns, of the true position of things, and, if possible, have the difficulty concerning my undivided half settled. I have spoken to James W. Nesmith, Esq., and to Mr. Pritchard, Secretary of State, and they will both hold themselves in readiness to act as my counsel.

"Should you find, after the return of Mr. Coffin, that the matter can be brought no nearer to a settlement upon just and equitable principles, I wish you to submit to them (Nesmith and Pritchard) all my papers, a part of which you have herewith, and others which you can have from A. L. Lovejoy, Esq., upon application to him, and direct them to pursue such measures as they deem most judicious.

"Mr. Lovejoy can give some valuable hints to my counsel, as he was formerly my agent. It will be necessary for you to advise the public of your appointment as my attorney during my absence. The proper kind of notice to publish, Nesmith or Pritchard can prepare.

"Wishing you may have but little trouble with my affairs, yet

trusting that you will battle to the utmost for my rights if necessary, I am yours, affectionately,

"BENJ. STARK.

"PORTLAND, 26th September, 1849."

Assuming to act under the authority of this power and letter, Couch undertook to obtain from Chapman and Coffin a ratification of the agreement of settlement between Stark and Lownsdale. For that purpose he consented to the modification demanded by them. Accordingly the agreement was ratified by Chapman and Coffin by the following instrument signed by them indorsed upon the agreement: —

"We, Stephen Coffin and W. W. Chapman, partners with Daniel H. Lownsdale, in the town of Portland, hereby ratify and confirm a certain agreement between Benjamin Stark and D. H. Lownsdale, bearing date the first day of March, A.D. 1850, respecting an adjustment of title, hereby placing the disposition of property up to notice of said adjustment upon the same footing with the disposition of property before the first day of January last.

"In testimony whereof we have hereunto set our hands and seals this the thirteenth day of April, A.D. 1850.

"S. COFFIN. [L. S.]
"W. W. CHAPMAN. [L. S.]"

Under this instrument the following ratification by the attorney of Stark was executed: —

"PORTLAND, O. T., April 15, 1850.

"I ratify the above agreement as far as my interest is concerned in said property.

"JOHN H. COUCH,
"*For* BENJ. STARK."

All other material facts are sufficiently stated in the opinion of the court.

The complainant obtained a decree for the release prayed, and the defendant appealed to this court.

Mr. Jeremiah S. Black for the appellant.
Mr. George H. Williams for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 7th of December, 1860, the Commissioner of the

General Land-Office at Washington issued a patent of the United States to the corporate authorities of the city of Portland, Oregon, for lands within the limits of the city to the extent of three hundred and seven acres and forty-nine hundredths of an acre, in trust for the several use and benefit of the occupants thereof. This patent was issued upon an entry made by the city authorities, on the belief that the lands were brought under the operation of the Town-Site Act of May 23, 1844, by the Organic Act of 1848, establishing the territorial government of Oregon, and were not subject to disposition under the Donation Act of 1850. The patent embraced the premises in controversy in this suit, but reserved from its operation any valid claims that might exist in virtue of the several donations to Benjamin Stark and others.

On the following day, Dec. 8, 1860, the Commissioner of the General Land-Office also issued a patent to Stark for land situated within the limits of Portland, claimed by him under the Donation Act, subject, however, to such rights as might exist in virtue of the entry by the city. This patent also covered the premises in controversy.

For several years before these patents were issued, the complainant, with his brother, had been in the occupation, use, and enjoyment of the premises, and had erected upon them expensive and permanent improvements. During this time they asserted, that, by virtue of a certain agreement made by Stark with parties through whom they had obtained their interest, they had acquired a right to have the legal title transferred to them, whenever that was obtained from the United States. After Stark had secured his patent, they applied to him for a release; but he refused to give them one, and threatened them with legal proceedings to recover possession of the premises. They thereupon brought a suit in equity in the State court to compel a release of his interest. In their bill, which was filed in January, 1864, they set forth their long and peaceable possession; that they had made large and valuable improvements; that the defendant asserted title to the premises under his patent, and threatened suits for their recovery; and stated the conveyances under which they claimed, and the agreement upon which they founded their right to a re-

lease of his interest; and they prayed a decree compelling such release.

Subsequently, the bill was amended by the addition of clauses setting forth the patent of the United States issued to the corporate authorities of the city, in trust for the several use and benefit of the occupants, and alleging that the complainants, as beneficiaries, claimed an interest in the premises under that instrument.

The State court appeared to consider these two grounds for equitable relief — one founded upon the agreement of Stark with the parties through whom the complainants claimed, and the other founded upon the city patent — as inconsistent with each other, and compelled the complainants to elect upon which they would proceed. They objected to the order, but, under its compulsion, elected to proceed upon the city patent. The bill was accordingly amended so as to present their claim for relief solely as beneficiaries under that instrument. The point in contention, then, was, which of the two patents carried the title to the premises. If the patent to the city authorities was valid, Stark took nothing by his patent. If, however, his patent was valid, the city had acquired no interest in the premises.

The State Circuit Court and the State Supreme Court held that the patent to Stark was void as against the complainants, and enjoined him from taking legal proceedings to eject them from the premises. The case having been brought to this court, the decree of the Supreme Court was reversed, and the cause remanded with directions to dismiss the suit. Upon our mandate the suit was accordingly dismissed in September, 1868. In deciding the case, we held that the act of 1848, organizing the Territory of Oregon, did not extend over the country the Town-Site Act of 1844, and that the patent to the city authorities, being made upon an entry under that act, passed no title to the land covered by the donation claim of Stark. His right to a patent had been previously perfected, and his claim had been surveyed before the passage of the act of 1854, by which the Town-Site Act was first extended with qualifications to the Territory. *Stark* v. *Starrs*, 6 Wall. 402.

After the suit was thus dismissed, Stark commenced actions

of ejectment against the tenants of the complainant for possession of the premises. These were consolidated into one action, in which Stark recovered judgment, with damages, for use and occupation. The complainant thereupon commenced the present suit in equity, alleging that he has a good and equitable title to the premises as against Stark, and praying an injunction against any legal proceedings for their possession, and a decree that he be required to release such title as he may have acquired by his donation claim and patent. In the bill the complainant sets up substantially the same matter, though with greater fullness and detail, which was originally averred in the first suit brought by himself and his brother, and omitted in the amended bill in that suit upon the election required by the court; and also claims that the defendant is estopped by his acts from asserting title to the premises.

The first question presented for our determination is, whether the complainant is concluded upon that matter in the present suit, by reason of the proceedings and decree in the first suit. While that suit was pending, the complainant acquired the interest of his brother.

It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action, — that is to say, distinct matters, — each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together. The agreement between Stark and the parties through whom the complainants claimed constituted a cause for relief, distinct from and independent of that arising from the interest asserted by them as beneficiaries under the patent to the city authorities. There was, therefore, no rule of law which compelled the presentation of the two causes of relief in the same suit. They required different alle-

gations in the bill, and different evidence on the hearing. The court might have considered one cause insufficient, and sustained the bill on the other. It might have ruled against the agreement, and, sustaining the city patent, enjoined the defendant from asserting any interest in the premises; or it might have denied the validity of the patent, and decreed a release upon the agreement. The provisions of the decree would have conformed to the cause sustained; its directions in the one case would have differed from its directions in the other. It was competent, therefore, and within the discretion of the court, to compel the presentation of the two causes, calling as they did for different relief in separate suits. A decision upon one could not possibly be a bar to proceedings upon the other, from their intrinsically distinct nature. Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring.

To appreciate and give proper effect to the agreement made by Stark with parties through whom the complainant derives his interest, and upon which he founds his claim to equitable relief in this suit, reference must be had to the condition on which land in Oregon was held at that time. The entire land in the Territory belonged to the United States. No provision had been made for the sale or other disposition of any portions of it to private parties. The pre-emption law had not been extended over the country, nor until the passage of the act of September 27, 1850, usually designated as the Donation Act, was there any known mode for obtaining the legal title. And yet the inhabitants dealt in the land as though possessed of the fee. They not only occupied, cultivated, and improved such portions as their necessities required, but they bought and sold it as land is bought and sold where the title has passed out of the government. This dealing in the land without having the title arose necessarily from the settlement of the country before the laws of the United States were extended over it. Indeed, a large number of emigrants from the United States had settled in the country whilst its sovereignty was in dispute with Great Britain. It was not until the 15th of June, 1846, that its sovereignty was determined by the treaty; and previous to this

time, in 1845, the emigrants had formed for themselves a provisional government, under which laws were passed, protection to persons and property secured, and justice administered, with all the order and regularity of long-established communities. The inhabitants engaged in the pursuits, industries, and enterprises which might be expected from an active, intelligent, and moral people. For the preservation of order and security, they were obliged to make some regulations for the possession and occupation of land among themselves. They accordingly established a land system, providing in what manner and to what extent land should be taken up and possessed. Under it each person over a specified age, upon complying with certain conditions, was allowed to hold six hundred and forty acres. He was required to designate the extent of his claim, either by natural or artificial boundaries; make, within prescribed periods, improvements thereon; and have the claim recorded in the office of the territorial recorder, in a book kept for that purpose. All claims thus taken up and recorded were respected by the people; and the claimants were protected, not only by the law of the provisional government, but by the general public sentiment of the country, in their possession and enjoyment. They were at liberty to use the claims for any legitimate purpose as absolute owners, either for cultivation and residences, or as sites for villages or towns. They did not deny, in any of their dealings, the proprietorship of the United States; but they acted upon a confident expectation that their possessions and improvements would be respected by the government, and that ultimately they should acquire the title.* This expectation was founded upon the uniform action of the government in its dealings with the public domain, occupied by settlers in advance of legislation for its sale. It was, therefore, understood by the people that, whenever the legal title was thus obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States. This understanding constituted, in reality, the unwritten conventional law of the State, which affected all transactions in land until the passage of the Dona-

* See observations of Mr. Justice Deady, of the United States District Court, on this subject, quoted in *Stark* v. *Starrs*, 6 Wall. 415; and of Mr. Justice Sawyer, of the United States Circuit Court, in *Lamb* v. *Davenport*, 1 Sawyer, 619–622.

tion Act. That act shows that Congress, in its passage, was cognizant of this fact; for it impliedly recognizes the validity of previous contracts for the transfer of land made by a claimant, to whom, upon proof of his settlement and its continuation for four years, a patent should be afterwards issued. This matter was considered by this court in *Lamb* v. *Davenport*, reported in the 18th of Wallace. It was there objected that a contract for the sale of lands thus held, made before the passage of the Donation Act, was void, because the proviso to the fourth section declares that all future contracts of sale by any person entitled to the benefit of the act, before he received a patent, should be void; but the court said, speaking through Mr. Justice Miller: "The act was on its face intended to cover settlements already made, and the careful limitation of this proviso to future contracts of sale — that is, sales made after the passage of the act — raises a strong implication of the validity of such contracts made before the passage of the statute. It was well known that many actual settlers held under such contracts, and while Congress intended to protect the donee from future improvident sales, it left contracts already made undisturbed." And the court held that the purchaser by such a contract acquired, as against his vendor, an equitable right to the land, which would be enforced when the legal title was obtained.

In the present case, it appears that prior to March 22, 1848, one Francis W. Pettygrove held a claim to six hundred and forty acres, taken up under the law of the provisional government, upon which a great part of the present city of Portland is built. On that day he conveyed his claim, with the exception of certain lots, and all his interest therein, "present and in expectancy," to Daniel H. Lownsdale. In March, 1849, Lownsdale conveyed his interest in the claim, with a similar exception of certain lots, to Stephen Coffin, taking back a contract, to the effect, substantially, that Coffin would hold the property equally for his benefit, and execute to him a good title to one-half of the claim, with the improvements, upon the termination of the contract. In December following, Lownsdale and Coffin conveyed one undivided third interest in the claim to Chapman. The three were, in fact, equal owners of the claim, and styled themselves partners in the property, although

the conveyances showed that the documentary title to it was in the names of Chapman and Coffin alone. These parties, while retaining the general possession and ownership of the claim, laid off upon it numerous blocks and lots, and sold a large number of the lots to different parties, publicly avowing at the time their intention to obtain, if possible, a title to the land from the United States, and thus to perfect the title of the purchasers.

In January, 1850, Lownsdale went to San Francisco, leaving a power of attorney with Chapman, to do any thing pertaining to his interest which Chapman might think advisable, particularly in signing deeds to lots in the city of Portland. Whilst in San Francisco, he met the defendant Stark, who claimed one-half interest in the Portland land claim by purchase from one Lovejoy, who, he asserted, held the claim originally with Pettygrove. A settlement was accordingly made between them. It was agreed that Lownsdale should release, with certain exceptions, all claim to land north of a designated line, now known as Stark Street; and that Stark should release, with certain exceptions, all claim to land south of the line, and confirm certain sales and conveyances made within the tract released to him. This agreement was carried out by a deed of mutual release and quitclaim executed by them on the 1st of March, 1850. The deed confirmed the conveyances of certain lots made by Lownsdale or his attorney previous to Jan. 1, 1850, north of the line, and all subsequent conveyances to March 1, 1850; but with a proviso that Stark should receive the proceeds of the subsequent conveyances. The instrument also provided, that in case any person, with certain exceptions, holding or claiming under Lownsdale, referring to Chapman and Coffin, should refuse to ratify and confirm the deed within six months, Stark might at his option have it cancelled.

Whilst Lownsdale was absent at San Francisco, three blocks were partitioned by Chapman and Coffin among the three owners, one block being taken by each at an agreed valuation. One of them, designated number 78, was assigned to Lownsdale, one, designated number 79, was assigned to Coffin, and one, number 81, was assigned to Chapman. This latter block lies north of the dividing line, within the tract falling to Stark,

and embraces the premises in controversy. The assignment of this block is contained in a deed purporting to be a conveyance by Chapman, Coffin, and Lownsdale, — the latter by Chapman, his attorney. As a conveyance of any interest to Chapman from Lownsdale, it is waste paper. An attorney cannot convey to himself by a power from his principal. But at that time Coffin, as already stated, held in his name the interest of Lownsdale. The instrument was therefore effectual as a release to Chapman of the entire interest of both. No one but Lownsdale could object to the transaction; and he never complained of it, but, on the contrary, approved of it. In the settlement between the joint owners or partners, Chapman was charged with the estimated value of the block.

When Chapman and Coffin learned of the agreement between Lownsdale and Stark, they refused to ratify it, unless it were modified so as to cover the transfers made by them during Lownsdale's absence, referring particularly to the disposition made of the three blocks. During the previous year, Stark, on leaving Portland, had given a power of attorney to his partner, to do any and all acts during his absence which he could do if present. Accompanying this power was a letter, in which the land claim was mentioned, and a desire expressed that his interest in that claim should be particularly attended to, and the difficulty concerning his undivided half settled. This attorney now undertook to remove the objection urged by Chapman and Coffin, and for that purpose, after some negotiation, he consented to the modification desired. The agreement was accordingly ratified by Chapman and Coffin, modified so as to place the disposition of property made by them previous to the time they received notice of the settlement upon the same footing with the disposition of property before the first of the previous January; and as thus modified the agreement was also ratified by the attorney. Afterwards, during the same year, and in January, 1851, Chapman sold the premises in controversy. A portion of them was purchased from him by the complainant and his brother. The rest of the premises was afterwards purchased by them from intermediate parties. They were all acquired before the patent of the United States was issued to Stark. The different purchasers went at once into

possession; and they or their grantees have ever since, either by themselves or tenants, been in the occupation of the property, and have made extensive and valuable improvements. The property is situated in the business part of Portland, and has always been occupied for business purposes.

The ratification made by the attorney of Stark, it is said, applies in terms only to the attorney's interest; but the answer is, that the attorney had no interest at the time, and acted only for Stark. If, as a ratification by Stark, it is insufficient in form, because of the manner in which the attorney has expressed his agency in appending his signature to the instrument, a court of equity will look beyond the form of the execution, and, having ascertained the intention of the attorney in signing the instrument, will, if possible, give it the effect intended. The ratification, such as it was, undoubtedly led to the purchase of the property by the complainant and his brother and others. When Stark subsequently returned to Portland, in June, 1850, he was informed of the action of his attorney, and made no objection to it, although he understood that it was intended as a ratification on his part of the disposition of the block in question by Chapman and Coffin.

But more persuasive evidence of his approval of the modification is furnished by his action with respect to the property. As already stated, the documentary title to the entire claim was in Chapman and Coffin. Without their approval, the settlement between Stark and Lownsdale would have failed of any result. Upon the ratification by the attorney, Chapman and Coffin abandoned all interest in any other property than block 81 north of the agreed line; and Stark at the same time abandoned his interest in the tract south of that line, and appropriated in severalty all the other property released on the north. In other words, instead of calling for a cancellation of the deed upon the refusal of Chapman and Coffin to ratify it, as he was at liberty to do, he adopted it as approved by them; for, except as thus approved, it was without any efficacy. He held nothing in severalty, except by their consent; and upon his claim to hold the property released in this way he subsequently obtained his patent from the government, and sold to different parties portions of the land. Under

these circumstances, he cannot be permitted to go back upon the act of his attorney.

So far, therefore, as the transfer of block 81 to Chapman is concerned, the deed must be held to apply to it as fully as it applies to the conveyances specially designated and confirmed by that instrument. It operated as a confirmation of the transfer, and gave to Chapman an equitable right to call for a release of the legal title, when that was obtained. That right passed to the complainant claiming under him.

During the several years intervening between this transaction and the issue of the patent, Stark frequently conversed with the Starrs and the other purchasers respecting the property, assured them, in repeated instances, that he would convey to them the legal title when he obtained the patent from the government, and advised them to erect buildings and improve the property. Under his eye, and with full notice, and by his encouragement, the Starrs, and others from whom the Starrs purchased, made the improvements. If in the light of these facts, and all the attending circumstances, the defendant could now successfully impugn the ratification made by his attorney, deny the promises made by himself, and deprive the complainant of the property and improvements, it would be a reproach to the administration of justice. Upon every principle of law and morals, he should be for ever enjoined from the commission of such injustice, and be compelled to quiet the title of the complainant by a release of all claim to the premises.

Decree affirmed.

NOTE. — In *Stark* v. *Starr* and *Same* v. *Bacon*, appeals from the Circuit Court of the United States for the District of Oregon, which were argued at the same time and by the same counsel as was the preceding case, MR. JUSTICE FIELD, in delivering the opinion of the court, remarked: "These cases involve some of the questions discussed and decided in the above case; and, upon the authority of that decision, the decrees in both are affirmed."

CLARK v. HANCOCK.

This court, where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss the writ of error before the return-day thereof.

MOTION to dismiss a writ of error to the Supreme Court of the State of California.

Mr. P. Phillips for the defendant in error, in support of the motion.

Mr. Thomas J. Durant and *Mr. C. W. Hornor, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The final judgment in this case was rendered Oct. 8, 1876, and the writ of error issued Nov. 16, returnable to the October Term, 1877. The defendants in error, having filed a copy of the record and docketed the cause, now move to dismiss, for want of jurisdiction.

It is not claimed by the plaintiff in error that there is any Federal question disclosed by the record, but it is insisted that a motion to dismiss cannot be entertained until the return-day of the writ. Such was the old practice; but in *Ex parte Russell*, 13 Wall. 671, and *Thomas* v. *Wooldridge*, 23 id. 288, the rule was changed. It seemed to us then that such a change would "be likely to prevent great delays and expense, and further the ends of justice." Subsequent experience confirms that opinion. In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely; and, when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind. In the present case, we have a printed record, and it is evident we have no jurisdiction.

Motion granted.

THE "MARGARET."

1. A steam-tug which engages to tow a vessel into a port, although not a common carrier nor an insurer, is bound to exercise reasonable skill and care in every thing relating to the work until it is accomplished, and she is liable for the want of either to the extent of the damage sustained.
2. She is bound to know the channel of her home port, how to reach it, and whether, in the state of the wind and water, it is safe and proper to attempt to enter with a tow.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. William P. Lynde for the appellant.

Mr. Alfred L. Cary, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a cause in admiralty. The libel alleges that the tug Margaret," in towing the brig "Mechanic" into the port of Racine, Wis., conducted the process so carelessly and unskilfully that the brig and cargo were sunk. This proceeding was instituted to recover damages for the loss sustained by the libellants. A decree was rendered in their favor, from which an appeal was taken to this court.

The entrance into the harbor is at the mouth of Root River. It has been improved by two piers. One of them is on the north, and the other on the south side. They are parallel to each other, and extend into the lake in a direction nearly due east, the north one running out about three hundred and thirty feet farther than the south one. The distance from the inside of the outer end of the south pier directly across to the inside of the north pier is two hundred and thirty-eight feet. At the entrance of the harbor, and for some distance farther west than the east end of the south pier, the channel ran close along the south side of the north pier. It was about seventy-five feet wide. South of the channel, between it and the south pier, and opposite to the end of that pier, there was a bar, with shoal water upon it. Just inside of the north pier the depth of water in the channel was fifteen and a half feet. From there to a point a long distance within the piers it varied; but the depth

was nowhere less than thirteen and a half feet. The depth upon the bar before mentioned was nine and a half feet. The brig at the time of the disaster drew ten feet.

The wind at the port was north-easterly, and was a light breeze. At the mouth of the harbor ground-swells came in from the lake. They were met by the undertow in the river. This increased the commotion of the waters. The highest swells broke over the end of the south pier, which was five feet above the ordinary water-level. This height of the swells was due to the shallowness of the water there. The harbor-master says, in his testimony: "As near as I could judge, the swells came up on the south pier. On the north pier they were not near so high. The south pier is where the shoal water is." Speaking of the channel hard by the north pier, he says: "I should think there was about half the swell there that there was on the south side of the harbor." Another witness says: "I should say there was not over twenty inches rise and fall on the mean level."

Such was the state of things to be encountered by the two vessels in entering the harbor, when the casualty set forth in the libel occurred.

On the 27th of November, 1869, the brig left the port of Suamico with a cargo of lumber for the port of Racine. She arrived off the latter port about noon on the 30th of that month, and at once signalled for the tug to come out and tow her in. The tug obeyed the signal. When she reached the brig, the latter was lying about a mile and a half north-east from the mouth of the harbor. The tug approached the brig on her starboard side. The captain of the brig inquired of the captain of the tug whether there was "much swell on." The latter answered, "No." The captain of the brig said his vessel drew ten feet of water. At the same time the linesman on the tug called for a line, and it was handed to him over the starboard bow. With reference to the wind where the vessels then were, the captain of the brig says: "There was a kind of a dead swell; there was no sea; there was very little wind." On these points there is no controversy between the parties.

The line was attached to the starboard side of the brig. Subsequently, another line was fastened to the port side, and both

lines were so shortened as to bring the tug and the tow into close proximity. There is an irreconcilable conflict in the testimony as to the time when the second line was applied, and when the lines were shortened. The witnesses for the respondents insist that both occurred before the towing began. Those for the libellants maintain that the second line was applied later, and that the tug stopped, and the lines were shortened when the tug was between two and three hundred feet from the north pier. It is not easy to reconcile these discrepancies; and we do not deem it very material to do so, by reason of facts occurring subsequently, and which are in nearer relation to the disaster.

The tug laid her course in a south-westerly direction towards the end of the north pier. Upon reaching it she made a short turn to the starboard around it and entered the harbor. The brig followed. She had entirely lost her steerage-way, and ceased to obey her helm. The tug had lost all control over her. She sagged off towards the south pier, and grounded on a bar, which she struck repeatedly with the rise and fall of the water. The tug stopped and then resumed her traction. The port line broke. Presently the starboard line broke also. The brig was thrown by the force of the swell upon the end of the pier. A hole was stove in her quarter. She was otherwise seriously damaged, and sunk. It is not denied that, in the crisis, the tug did all that could be done to relieve her from the perils of her situation. The effort was unavailing.

No serious attempt was made here to inculpate the brig. The tug was the dominant mind and will in the adventure. It was the duty of the brig to follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere was incumbent on the tow. It does not appear that there was a failure in any of these particulars.

If the port line was too weak, the tug should have called attention to it. Silence was a fault. The learned circuit judge found as a fact that the breaking of the line was not the cause, but the consequence, of the grounding; and in this we concur with him.

The tug was not a common carrier, and the law of that rela-

tion has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in every thing relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences. *Brown* v. *Clegg*, 68 Penn. St. 41; *The Quickstep*, 9 Wall. 665; *Wooden* v. *Austin*, 51 Barb. 9; *Wells* v. *Steam Navigation*, 8 N. Y. 375; *Steamer New Philadelphia*, 1 Black, 62; *The Cayuga*, 16 Wall. 177; *James Gray* v. *John Frazier*, 21 How. 184.

The port of Racine was the home port of the tug. She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning. If what occurred was inevitable, she should have forecasted it, and refused to proceed. The spring-head of the disaster was the sudden turn of the tug around the end of the pier, combined with the shortness of the tow-lines. These involved the stopping of the tug and the loss of the steerage-way of the brig. The drifting of the latter, her impinging upon the pier, and her fracture and sinking, necessarily followed.

Conceding that the mode of entering the harbor by the tug was the best under the circumstances, and the disaster thereafter inevitable, then the effort showed a clear want of judgment. As before remarked, she should have known this, and governed herself accordingly. Her conduct, in this view, was more than an error. It was a fault; and upon this ground she should be condemned.

But there is another view of the case, more satisfactory to our minds and more clearly conclusive against the tug.

She took charge of the brig a mile and a half from the harbor. She had the whole surface of the lake for sea-room. There was nothing in the way. The wind was light and the sea was calm. She could have made any curvature necessary to put herself and the tow upon a right line to the harbor. Her course could then have been laid accordingly.

She could have entered just where she did enter. She could have safely passed the swells she would have encountered. Her experience as she did enter proves this to have been so. She would have avoided the shoal-water and bar south of the channel where the swells were the highest. A single line would have answered for the tow. It might have been of any length deemed proper. The tow would have had ample steerage-way, and have obeyed her helm. She could have been kept in the wake of the tug, and would have safely passed the ground-swell, as did the tug. There being ample depth of water in the channel, and being larger and heavier than the tug, she would have encountered even less of difficulty and danger. The tug need not have stopped a moment. There would have been no tension and breaking of the lines by the grounding and jerkings of the brig. The traction would have gone on in unbroken continuity until the tow was so far within the harbor as to have been out of peril. The expert testimony proves that this could and should have been done. We find no sufficient answer to this view either in the record or in the able and elaborate argument submitted by the counsel for the appellants.

Upon this ground, also, we find the tug in fault.

Decree affirmed.

SUPERVISORS *v.* KENNICOTT.

Whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. The subsequent appeal brings up only the proceedings of the Circuit Court after the mandate of this court.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

Argued by *Mr. A. L. Knapp* for the appellants. The court declined to hear further argument.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

When this case was here on a former appeal, we decided that the mortgage in controversy was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the com-

plainants were entitled to a decree for the amount of the bonds held by them. *Kennicott* v. *Supervisors*, 16 Wall. 468, 471. These questions are, therefore, no longer open; for it is settled in this court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court, after the mandate of this court. *Himely* v. *Rose*, 5 Cranch, 314; *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; *Browden* v. *McArther*, 12 id. 53; *Sibbard* v. *United States*, 12 Pet. 492; *Corning* v. *Troy Iron and Nail Co.*, 15 How. 466; *Sizer* v. *Manry*, 16 id. 103; *Roberts* v. *Cooper*, 20 id. 481; *Tyler* v. *Maguire*, 17 Wall. 283.

It is true that, after reversing the decree of the Circuit Court upon the former appeal, it was further ordered that the cause be remanded "with directions to award a new trial;" but the mandate as sent down "commanded that such execution and further proceedings be had in conformity to the opinion and decree of this court, as according to right, &c., ought to be had." Technically, there can be no "new trial" in a suit in equity; and as our mandates are to be interpreted according to the subject-matter of the proceeding here, and, if possible, so as not to cause injustice, *Story* v. *Livingston*, 13 Pet. 359, it is proper to inquire what must have been intended by the use of that term in the decree, since it cannot have its ordinary meaning. For that purpose, we held, in *West* v. *Brashaer*, 14 Pet. 51, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that the complainants were entitled to their judgment. Under these circumstances, it is apparent that the words "new trial" were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided. No error has been assigned upon the proceedings in the Circuit Court under the mandate construed in this way, and the decree of the Circuit Court is, therefore, *Affirmed.*

EYSTER v. CENTENNIAL BOARD OF FINANCE.

In the distribution of the moneys remaining in the treasury of the Centennial Board of Finance at the close of that corporation, as provided for in sect. 10 of the act of Congress of June 1, 1872 (17 Stat. 208), the appropriation of $1,500,000, made by the act of Feb. 16, 1876 (19 id. 3), must be paid into the treasury of the United States before any division of assets is made among the stockholders in satisfaction and discharge of the capital stock.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith and *Mr. William M. Springer* for the appellant.

Mr. William Henry Rawle and *Mr. Robert N. Willson*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case presents the single question whether, in the distribution of the moneys remaining in the treasury of the Centennial Board of Finance at the close of the affairs of that corporation, as provided for in sect. 10 of the act of June 1, 1872, the appropriation of $1,500,000 made by Congress in the act of Feb. 16, 1876, must be paid into the treasury of the United States before any division of assets is made among the stockholders in satisfaction and discharge of the capital stock.

It is very apparent that the object of Congress, in all its legislation with reference to the Centennial Exhibition, was to enable the people of the United States to commemorate "the completion of the first century of their national existence" by an exhibition "in which the people of the whole country should participate," and which should have the sanction of the government. In that sense, the object was national; but it is equally clear, that, until the act of 1876, it was expected that the entire expense would be borne by the people without assistance from Congress. Certainly, no pecuniary liability whatever was assumed by Congress. That is declared in the most positive terms.

The acts of 1871 and 1872 did nothing more than provide the necessary organizations through which the people might

operate under the auspices of the government. That of 1871 authorized the appointment of the board of commissioners, which was afterwards, by the act of 1872, incorporated as the "United States Centennial Commission." The duty of this board was to prepare and superintend the execution of a plan for holding the exhibition. That of 1872 was specially intended to provide a way by which the people could procure the necessary funds. It was so expressly declared in the preamble; and for that purpose the Centennial Board of Finance was incorporated, with apt provisions for subscription to and sale of its capital stock, and for the control and management of its affairs. The proceeds of the stock, together with the receipts from all other sources, were to be used by this corporation for the erection of buildings with their appurtenances, and for all other expenditures required in carrying out the objects of the act of 1871. Then, by sect. 10, it was provided, "that, as soon as practicable after the said exhibition shall have been closed, it shall be the duty of said corporation to convert its property into cash, and, after the payment of its liabilities, to divide its remaining assets among its stockholders, *pro rata*, in full satisfaction and discharge of its capital stock."

Afterward came the act of 1876, which made the appropriation now under consideration, "to complete the . . . buildings and other preparations," and directed its payment to the president and treasurer of the Centennial Board of Finance for that purpose, but which contained a proviso, "that in the distribution of any moneys that may remain in the treasury of the Centennial Board of Finance after the payment of its debts, as provided for by the tenth section of the act of Congress approved June 1, 1872, incorporating the Centennial Board of Finance, the appropriation hereinbefore made shall be paid in full into the treasury of the United States before any dividend or percentage of profits shall be paid to the holders of said stock;" and "that the government of the United States shall not, under any circumstances, be liable for any debt or obligation of the United States Centennial Commission or the Centennial Board of Finance, or any payment in addition to the foregoing sum."

The whole controversy arises upon this proviso. On the one

hand, it is contended that it requires the repayment to the United States of the full amount of their appropriation before any distribution can be made to the stockholders; and, on the other, that the stockholders must be reimbursed for their stock subscriptions before any payment is made to the United States. It becomes necessary, therefore, to ascertain the intention of Congress in this particular, and for that purpose the acts of 1871, 1872, and 1876, being *in pari materia*, are to be examined and construed together.

There is no doubt but that the act of 1876 appropriated public moneys for the completion of the centennial buildings and other preparations. Neither is there any doubt that, under certain circumstances, the Centennial Board of Finance was required to pay back to the treasury of the United States the full amount of the appropriation. The corporation assumed such an obligation by taking the money upon the conditions imposed. If this did not create a debt, technically so called, it certainly did create a liability. The act of 1872 provided for a division of the assets of the corporation among the stockholders, only after the payment of all liabilities; and, unless the contract entered into otherwise directs, it would seem to be clear, that, so far as that act is concerned, the United States must be paid in full before the stockholders can claim any distribution among themselves.

In the act of 1876, the language is somewhat different. By that the United States are to be paid out of the moneys that remain in the treasury of the company, after the payment of the debts. If this were all, the intention would be manifest. The liability of a corporation to its stockholders on account of their stock is not a debt. The shares of a stockholder represent his proportion of the property of a corporation; and, upon the winding up of its affairs, the assets remaining after all liabilities are discharged are for division among the stockholders, according to their respective interests. The payment to stockholders upon such a division is for a dividend of the property divided, not for a debt owing by the corporation. The United States, then, even under this act, are entitled to a preference over the stockholders, unless the words "before any dividend or percentage of profits shall be paid to the holders of such

stock" change the condition of the parties. This will depend much upon the signification of the term "profits" as here used.

In construing statutes, some effect should, if possible, be given to every word employed to express the legislative will. Nothing should be rejected, if it can be avoided; and nothing can be added, except by implication from what is expressed. As in the act of 1872 stockholders are not to be paid any thing until all liabilities are discharged, and in that of 1876 the United States are to be reimbursed before any profits can be divided, and no provision is made for the redemption of capital stock, except upon a division of the profits, it is apparent that, if such a redemption is to be made before the liability of the United States is satisfied, something must be supplied in the statute, by implication, that has been apparently omitted. The presumption is, however, that every thing has been expressed which was intended; and, if an effect can properly be given to the word "profits" that will harmonize the two statutes, without a resort to implication, it should be done.

The capital stock of this corporation was not employed in, but to prepare for, the business of the contemplated exhibition; and the receipts of the exhibition, over and above its current expenses, are the profits of the business. These were the only profits anticipated. They are, in fact, the net receipts, which, according to the common understanding, ordinarily represent the profits of a business. The public, when referring to the profits of the business of a merchant, rarely ever take into account the depreciation of the buildings in which the business is carried on, notwithstanding they may have been erected out of the capital invested. Popularly speaking, the net receipts of a business are its profits. So here, as the business to be carried on was that of an exhibition, and its profits were to be derived only from its receipts, to the popular mind the net receipts would represent the net profits.

Giving that signification to the word in this case, we encounter no difficulties. The statutes are complete, and there is nothing to supply. Every thing is in harmony, and no strained construction is required. All accounts are easily adjusted, without resort to unusual proceedings.

When a corporation is to be wound up, there is not, ordina-

rily, a necessity for an account of profits. After the liabilities are paid, the remaining assets belong to the stockholders, and all that need be done is to make the proper division. For that purpose, it is quite immaterial whether what remains is profit or capital. In either case, it belongs to the stockholders, and is to be distributed among them *pro rata*. Such a division produces a dividend, — that is to say, a part or share of the thing divided. If the division is of profits, then the dividend is of profits; if of capital, then of capital. The dividends declared by a corporation in business usually are, and, except under special circumstances, always should be, from profits. Hence, the word frequently carries with it the idea of a division of profits; but that is not necessarily its only meaning. Its special signification, in any particular case, is always dependent upon the character of the thing divided.

By the act of 1872, the assets were to be reduced to cash, liabilities paid, and the remainder divided among stockholders. The words "in satisfaction and discharge of its capital stock" add nothing to, and take nothing from, what precedes; and the whole of that part of sect. 10, taken together, provides for nothing more than what would have been done without it. If there had not been a word upon the subject, the law would have disposed of the property in precisely the same way, and the stockholders could have compelled a settlement upon that basis.

The act of 1876 requires the payment of debts, and then the reimbursement of the United States before a distribution of profits to stockholders. Not a word is said about restoring capital: in fact, there is no mention of capital at all. The act of 1872 is not repealed. On the contrary, it is left in full force in every particular, save that the new liability incurred to the United States is made payable after those contemplated by the act of 1872 are satisfied in full. In this, the United States made a concession to creditors, but not to the stockholders. Neither was any thing taken from stockholders: they retain all the rights which the act of 1872 gave them. If there had been no appropriation by Congress, the corporation would have been driven to the necessity of raising the required means, by borrowing or a further sale of stock. If by borrowing, the

debt so created would have to be paid with the others, before there could be any dividend to stockholders. If by sale of stock, the new stockholders would come in *pro rata* with the old upon the final division of the assets.

Congress might have advanced the money by loan as well as upon the conditions it did impose. It might also have subscribed to the stock. If a loan had been made, and there had been no waiver of the legal rights of the government as a creditor, this debt would have preference over all others in the order of payment. If stock had been taken, the government would have participated in the final distribution like any other stockholder. It seemed best, however, not to adopt either of these plans, and another was devised, by which creditors were given a preference, and the United States remitted for their indemnity to the fund which might remain after all the debts were paid. To this the corporation assented, and the stock holders cannot now complain. Creditors were protected, and stockholders not injured.

We think, therefore, that Congress did not intend, by the act of 1876, to change the order of distribution as provided by that of 1872, except by giving a preference to other liabilities over that to the United States, and that the word "profits" was used in 1876 to represent the net receipts of the business of the exhibition to be had in the buildings erected and upon the grounds prepared for its accommodation by means of the capital of the Centennial Board of Finance. In this way "profits," in the act of 1876, and "remaining assets," in that of 1872, have substantially the same meaning; and the two statutes are relieved from all discrepancies, without doing violence to the language of either.

If the impaired capital is made good out of the profits, it will be for the purposes of distribution only. Indirectly, therefore, a division of the capital unimpaired would operate as a dividend of profits, because, before the stockholders could be paid in full the receipts of the business must be applied to supply the deficiency arising from depreciation. Such a dividend is prohibited.

The decree of the Circuit Court must be reversed, and the cause remanded, with instructions to enter a decree directing

the payment of the sum of $1,500,000 into the treasury of the United States by the Centennial Board of Finance before any division of the remaining assets of that corporation is made among the stockholders, and it is *So ordered.*

MR. JUSTICE STRONG dissented.

ALLORE v. JEWELL.

1. Whenever there is great weakness of mind, though not amounting to absolute disqualification, arising from age, sickness, or any other cause, in a person executing a conveyance, and the consideration given for the land is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside.
2. When a person, from infirmity and mental weakness, is likely to be easily influenced by others, transactions entered into by such person without independent advice will be set aside, if there is any unfairness in them. The principle upon which courts act in such cases, applied to a conveyance of land obtained from a woman advanced in years, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness.
3. The lapse of time, six years, before bringing suit to cancel a conveyance so obtained, cannot avail the defendant where he has had possession of the land, and a reasonable rent therefor is equal to the value of his improvements thereon, and there has been no loss of evidence preventing a full presentation of the case.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. Alfred Russell for the appellant.
Mr. A. B. Maynard, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit brought by the heir-at-law of Marie Genevieve Thibault, late of Detroit, Mich., to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when, from her condition, she was incapable of understanding the nature and effect of the transaction.

The deceased died at Detroit on the 4th of February, 1864, intestate, leaving the complainant her sole surviving heir-at-law. For many years previous to her death, and until the execution of the conveyance to the defendant, she was seised in fee of the land in controversy, situated in that city, which she occupied as a homestead. In November, 1863, the defendant obtained from her a conveyance of this property. A copy of the conveyance is set forth in the bill. It contains covenants of seisin and warranty by the grantor, and immediately following them an agreement by the defendant to pay her $250 upon the delivery of the instrument; an annuity of $500; all her physician's bills during her life; the taxes on the property for that year, and all subsequent taxes during her life; also, that she should have the use and occupation of the house until the spring of 1864, or that he would pay the rent of such other house as she might occupy until then. The property was then worth, according to the testimony in the case, between $6,000 and $8,000. The deceased was at that time between sixty and seventy years of age, and was confined to her house by sickness, from which she never recovered. She lived alone, in a state of great degradation, and was without regular attendance in her sickness. There were no persons present with her at the execution of the conveyance, except the defendant, his agent, and his attorney. The $250 stipulated were paid, but no other payment was ever made to her; she died a few weeks afterwards.

As grounds for cancelling this conveyance, the complainant alleges that the deceased, during the last few years of her life, was afflicted with lunacy or chronic insanity, and was so infirm as to be incapable of transacting any business of importance; that her last sickness aggravated her insanity, greatly weakened her mental faculties, and still more disqualified her for business; that the defendant and his agent knew of her infirmity, and that there was no reasonable prospect of her recovery from her sickness, or of her long surviving, when the conveyance was taken; that she did not understand the nature of the instrument; and that it was obtained for an insignificant consideration, and in a clandestine manner, without her having any independent advice.

These allegations the defendant controverts, and avers that

the conveyance was taken upon a proposition of the deceased; that at the date of its execution she was in the full possession of her mental faculties, appreciated the value of the property, and was capable of contracting with reference to it, and of selling or otherwise dealing with it; that since her death he has occupied the premises, and made permanent improvements to the value of $7,000; and that the complainant never gave him notice of any claim to the property until the commencement of this suit.

The court below dismissed the bill, whereupon the complainant appealed here. The question presented for determination is, whether the deceased, at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation.

Numerous witnesses were examined in the case, and a large amount of testimony was taken. This testimony has been carefully analyzed by the defendant's counsel; and it must be admitted that the facts detailed by any one witness with reference to the condition of the deceased previous to her last illness, considered separately and apart from the statements of the others, do not show incapacity to transact business on her part, nor establish insanity, either continued or temporary. And yet, when all the facts stated by the different witnesses are taken together, one is led irresistibly by their combined effect to the conclusion, that, if the deceased was not afflicted with insanity for some years before her death, her mind wandered so near the line which divides sanity from insanity as to render any important business transaction with her of doubtful propriety, and to justify a careful scrutiny into its fairness.

Thus, some of the witnesses speak of the deceased as having low and filthy habits; of her being so imperfectly clad as at times to expose immodestly portions of her person; of her eating with her fingers, and having vermin on her body. Some of them testify to her believing in dreams, and her imagining she could see ghosts and spirits around her room, and her claiming to talk with them; to her being incoherent in her conversation,

passing suddenly and without cause from one subject to another; to her using vulgar and profane language; to her making immodest gestures; to her talking strangely, and making singular motions and gestures in her neighbors' houses and in the streets. Other witnesses testify to further peculiarities of life, manner, and conduct; but none of the peculiarities mentioned, considered singly, show a want of capacity to transact business. Instances will readily occur to every one where some of them have been exhibited by persons possessing good judgment in the management and disposition of property. But when all the peculiarities mentioned, of life, conduct, and language, are found in the same person, they create a strong impression that his mind is not entirely sound; and all transactions relating to his property will be narrowly scanned by a court of equity, whenever brought under its cognizance.

The condition of the deceased was not improved during her last sickness. The testimony of her attending physician leads to the conclusion that her mental infirmities were aggravated by it. He states that he had studied her disease, and for many years had considered her partially insane, and that in his opinion she was not competent in November, 1863, during her last sickness, to understand a document like the instrument executed. The physician also testifies that during this month he informed one Dolsen, who had inquired of the condition and health of the deceased, and had stated that efforts had been made to purchase her property, that in his opinion she could not survive her sickness, and that she was not in a condition to make any sale of the property "in a right way."

This Dolsen had at one time owned and managed a tannery adjoining the home of the deceased, which he sold to the defendant. After the sale, he carried on the business as the defendant's agent. Through him the transaction for the purchase of the property was conducted. The deceased understood English imperfectly, and Dolsen undertook to explain to her, in French, the contents of the paper she executed. Some attempt is made to show that he acted as her agent; but this is evidently an afterthought. He was in the employment of the defendant, had charge of his business, and had often talked with him about securing the property; and in his interest he

acted throughout. If the deceased was not in a condition to dispose of the property, she was not in a condition to appoint an agent for that purpose.

The defendant himself states that he had seen the deceased for years, and knew that she was eccentric, queer, and penurious. It is hardly credible that, during those years, carrying on business within a few yards of her house, he had not heard that her mind was unsettled; or, at least, had not inferred that such was the fact, from what he saw of her conduct. Be that as it may, Dolsen's knowledge was his knowledge; and, when he covenanted to pay the annuity, some inquiry must have been had as to the probable duration of the payments. Such covenants are not often made without inquiries of that nature; and to Dolsen he must have looked for information, for he states that he conversed with no one else about the purchase. With him and with his attorney he went to the house of the deceased, and there witnessed the miserable condition in which she lived, and he states that he wondered how anybody could live in such a place, and that he told Dolsen to get her a bed and some clothing. Dolsen had previously informed him that she would not sell the property; yet he took a conveyance from her at a consideration which, under the circumstances, with a certainty almost of her speedy decease, was an insignificant one compared with the value of the property.

In view of the circumstances stated, we are not satisfied that the deceased was, at the time she executed the conveyance, capable of comprehending fully the nature and effect of the transaction. She was in a state of physical prostration; and from that cause, and her previous infirmities, aggravated by her sickness, her intellect was greatly enfeebled; and, if not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, and the securing of an annuity for life. Certain it is, that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities, on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance.

It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a

state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of *Harding* v. *Wheaton*, reported in the 2d of Mason, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. "Extreme weakness," said Mr. Justice Story, in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." The case subsequently came before this court; and, in deciding it, Mr. Chief Justice Marshall, speaking of this, and, it would seem, of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles. *Harding* v. *Handy*, 11 Wheat. 125.

The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate,

a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

In the recent case of *Kempson* v. *Ashbee*, 10 Ch. Cas. 15, decided in the Court of Appeal in Chancery in England, two bonds executed by a young woman, living at the time with her mother and step-father, — one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond, — were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed.

The objection of the lapse of time — six years — before bringing the suit cannot avail the defendant. If during this time, from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having, in the manner stated, obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe, that the complainant received from the

administrator of the deceased's estate only $113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them.

Decree reversed, and cause remanded with directions to enter a decree as thus stated.

MR. JUSTICE STRONG, with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE BRADLEY, dissenting.

I cannot concur in the judgment given in this case. Were there no other reason for my dissent, it would be enough that the complainant has been guilty of inexcusable laches. He knew every thing of which he now complains, in February, 1864, when the grantor of the defendant died, and when his rights as her heir vested; and yet he waited until six years and nine months thereafter before he brought this suit, and before he made any complaint of the sale she had made. Meanwhile, he accepted the money the defendant had paid on account of the purchase, and he stood silently by, asserting no claim, while the defendant was making valuable improvements upon the lot, at a cost of $6,000 or $7,000, a sum about equal to the value of the property at the time of the purchase. To permit him now to assert that the sale was invalid, because the vendor was of weak mind, is to allow him to reap a profit from his own unconscionable silence and delay. I cannot think a court of equity should lend itself to such a wrong.

DAVIS v. CROUCH.

This court has no jurisdiction to re-examine the decree of the highest court of a State, reversing that of an inferior court, and remanding the cause for further proceedings.

ERROR to the Supreme Court of Appeals of the State of Virginia.

Hector Davis died during the late civil war, at Richmond, Va., leaving a will executed March 21, 1859, as follows: —

"RICHMOND, March 21, 1859.

"I, Hector Davis, of city of Richmond, State of Virginia, do hereby make this my last will and testament: Item 1st, I give to my nieces, Jannie, Sally, and Bettie Davis, the sum of $15,000, to be equally divided between them. I give to a servant-woman, Ann, of mine, her freedom, to be removed out of the State, with her four children, Jannie, Audubon, and Victoria, and after their removal the sum of $20,000, she, Ann, to have the interest on one-fifth of the amount, and the interest of the balance to be expended in raising the said children till they become of age; then the principal to be given them. I wish said amount to be invested in State stock by my executors, and applied as aforesaid.

"I give my nephew, R. D. James, of Goochland, the sum of $5,000. Whatever balance I may be worth, I want given to my sister, Ann Crouch, and her children. I appoint R. D. James and Franklin Matthews my executors to this my last will and testament.

"As witness my hand and seal.

"HECTOR DAVIS.

"Witnesses: B. W. ELMORE.
S. N. DAVIS."

This will was admitted to probate in the Circuit Court of the city of Richmond, March 18, 1863, when James alone qualified as executor. The servant-woman Ann and her children are the present plaintiffs in error, and are known in the pleadings as Ann Davis, Jannie Davis, Audubon Davis, Victoria Davis, and Matilda Davis. They were removed at some time to Philadelphia, but whether before or after the death of the testator,

does not appear, though they seem to have been there during the war.

The estate was large, consisting of real property, slaves, bank and other stocks, a small amount of Confederate bonds, debts due the testator, and some furniture. All the parties interested in the settlement of the estate resided in the Confederate States during the war, except Ann Davis and her children.

The personal property, exclusive of debts due the estate, was valued at $91,020. Feb. 20, 1864, leave was granted the executor by that court, upon his petition therefor, to invest the cash on hand belonging to the estate in interest-bearing bonds or certificates of the Confederate States, or of the State of Virginia, or any other sufficient bonds or securities in that State. Under this order he invested, during the months of April, July, and November of that year, $33,508.82 of Confederate currency in Confederate bonds. A part of the slaves were sold, but nearly all the remainder of the personal and real property, except the debts, was retained during the war in the condition it was left by the testator at his death.

At the close of the war, proceedings were instituted in the Chancery or Circuit Court of the city of Richmond against the executor by the residuary legatees, looking toward a settlement of the estate; and, Nov. 9, 1865, the executor filed in that court a bill in chancery against all the legatees, including Ann Davis and her children, to have the whole estate settled up and distributed among the parties entitled thereto. In these proceedings the executor was ordered to render an account of his transactions before one of the commissioners of the court, who was directed to take an account of all the assets belonging to the estate, and of all claims due by the same. A report was filed by the commissioner, Feb. 16, 1868, to which exceptions were taken both by the executor and the residuary legatees; and, May 19, 1869, the report was recommitted to the commissioner, with the exceptions, for further examination, and a restatement of the accounts, if necessary. Nov. 16, 1869, Ann Davis and her children appeared, and, by leave of the court, filed an answer to the bill of the executor, in which they claimed their full rights, and particularly objected to the

investments in Confederate bonds, as unauthorized and illegal, so far as they were concerned. A second report was filed by the commissioner, May 4, 1870, from which, with that of 1868, it appeared that the debts owing by the estate amounted to about $23,000; that there was in the hands of the executor United States currency to the amount of $14,188.54; that the estimated value of the real estate was $15,435; that the estimated value of Virginia State stock and furniture was $1,524; and that there were also in the hands of the executor debts due the estate, marked "good" or "doubtful," of the nominal amount of $40,000 and more. In stating the account, the executor was allowed a credit for his investments in Confederate bonds. Many exceptions were filed to the report by the residuary legatees, and, among others, because the executor was credited with the amount of these investments, and because he had not been "charged with every debt reported by him 'good' and every debt reported by him 'doubtful,' unless he had obtained judgments upon them, because it was his duty to have obtained judgments against all who did not pay and were not deemed insolvent."

At the hearing in the Circuit Court both these exceptions were overruled, and a decree entered confirming the report, with some modifications. From this decree Ann Davis and the residuary legatees took an appeal to the Supreme Court of Appeals of the State, where the following judgment was entered April 22, 1873: —

"This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said Chancery Court erred in overruling the appellant's fifteenth exception to the report of Commissioner Evans; instead of doing which, the said court ought to have recommitted the said report, as to the matter of the exception, to a commissioner of the court, with instructions to make further inquiry, and report as to the debts of the estate of Hector Davis at the time of his death, by persons residing in the State; whether any of said debts, and which of them reported as worthless or doubtful, are now available, or might have been collected or secured by lien upon real estate or other-

wise, or by suits instituted since the death of the testator, and as to any other matters connected with said debts which the said commissioner might deem material, or concerning which either of the parties might require him to make inquiry and report; but the court is further of opinion that there is no other error in the said decree than as aforesaid. Therefore, it is decreed and ordered that so much of the said decree as is above declared to be erroneous be reversed and annulled, and the residue thereof affirmed; and that the appellee, R. D. James, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is ordered that this cause be remanded to the said Chancery Court for further proceedings to be had therein, in conformity with the foregoing opinion and decree, which is ordered to be certified to the said Chancery Court of the city of Richmond."

This judgment has been brought here by Ann Davis and her children upon a writ of error, and the executor now moves to dismiss the writ, because the judgment of the Court of Appeals is not the final judgment or decree in the suit.

Mr. J. Randolph Tucker for the plaintiffs in error.
Mr. Conway Robinson, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Our jurisdiction upon writs of error to State courts is confined to the final judgment or decree in a suit in the highest court in which a decision in the suit can be had. Rev. Stat. 709. This, we think, is not such a judgment. It decides some of the questions involved in the controversy between the parties, but the suit itself has been sent back to the Circuit Court for further proceedings, in conformity to the opinion filed with the record. In short, the judgment is one of reversal only, which, as we have uniformly held, is not a final judgment in the suit. *McComb* v. *Commissioners*, 91 U. S. 1; *Parcels* v. *Johnson*, 20 Wall. 654; *Tracy* v. *Holcomb*, 24 How. 427. After the further proceedings which have been ordered in the Circuit Court, the suit may be again taken to the Court of Appeals, and another judgment rendered there.

The object of the parties is to settle and distribute the estate of the testator under the direction of the court. The plaintiffs

in error are only interested in securing the payment of their legacy. A statement of the accounts of the executor, upon the principles settled by the Court of Appeals, may produce a fund sufficient to satisfy them. The only question upon which our jurisdiction can be invoked arises out of the decision as to the liability of the executor to account for his investments in Confederate securities. As to this, the present plaintiffs in error, having been non-residents of the Confederate territory during the war, occupy a different position from the other parties; and, until the suit has been finally disposed of in the State courts, the fund ascertained, and the results of a decree ordering distribution known, we cannot tell whether they will be injuriously affected by the errors now complained of. They cannot bring the case here for the benefit of the other parties interested in the estate, except so far as the relief granted to them may indirectly operate to the advantage of the others. If in the end, upon the distribution of the estate under the principles of accounting as now established, they shall not be able to obtain payment of the amount due them, the case may be again taken to the Court of Appeals upon the future decree of the Circuit Court, and from there here, if necessary. Whether their interest in the convertible value of the Confederate currency invested in Confederate bonds for the purchase of State stock is sufficient to justify them in doing so, will be a matter for them to determine, after the final decree shall have been rendered.

In the present condition of the suit, however, we are compelled to dismiss the writ for want of jurisdiction.

Writ dismissed.

THE "EDITH."

1. Under the maritime law, there is no lien upon a vessel for materials furnished and work done in repairing her at her home port.
2. A creditor, claiming the benefit of the provisions of the statute of New York, passed April 24, 1862, which purport to give such a lien, must, whether they be invalid or not, — a point which the court deems it unnecessary in this case to decide, — take it subject to all the conditions which they impose; and he loses it if it be not enforced within the time prescribed. Where a

seizure has been seasonably made, a bond in conformity to them, when executed and delivered to him by the owner, is a substitute for the lien, and works a discharge of the vessel.

3. The District Court can marshal the fund in its registry only between lienholders and owners.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

In July, 1870, Buckman & Co., having done work and furnished materials amounting to $3,597.37 in repairing the "Edith," while she was lying in navigable waters in her home port of New York, claimed a lien on the ship for materials and repairs, under an act of the State of New York, entitled "An Act to provide for the collection of demands against ships and vessels," passed April 24, 1862. Acts of 1862, p. 456. The requisite notice was filed the twenty-seventh day of July, 1870, a few days after the vessel had left that port. Some time after her return, the precise period not appearing, proceedings were instituted by the firm, and an attachment was issued to the sheriff of the city and county of New York, who, after seizing her, discharged her on a satisfactory bond for the claim having been given on behalf of the owner. On the first day of April, 1871, she was libelled in the District Court of the United States, sitting in admiralty, and sold under a decree rendered on the 8th of the following month. After satisfying the decree and subsequent costs, there remained $31,176.82 in the registry of the court. On the 17th of the latter month, the firm filed their petition in that court, praying that so much of the fund as was necessary be applied to the payment of the amount so due them, which they claimed was, at the time it accrued, a lien on the "Edith," she being a domestic vessel belonging to the port of New York. At the time of filing the petition, a suit by the firm on the bond, which had been given to release her from the attachment, was pending in the State court.

The petition was resisted by Sedgwick, the assignee in bankruptcy of the owner of the "Edith," and by Tyler. To the latter more than the amount of the fund was then due from the owner, who had executed a mortgage therefor on three-fourths of the vessel Jan. 11, 1870. The instrument was recorded the same day in the New York custom-house, and

a copy of it filed in the office of the register of the city and county of New York. There was also a prior mortgage on one-half of the vessel.

The District Court decided that Buckman & Co. had not a lien on the ship, nor any title to such fund as between them and the assignee in bankruptcy and the mortgagees.

The petition of Buckman & Co. was dismissed; and they appealed to the Circuit Court of the United States for that district, where a decree of affirmance was passed. They then appealed to this court.

Mr. F. A. Wilcox for the appellants.

Mr. E. P. Wheeler, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

Assuming that, by virtue of the provisions of the statute of New York, of April 24, 1862, 4 Gen. Stat. 632, the appellants had a lien upon the ship for the repairs made and materials furnished by them, it is a vital question whether that lien remained in existence when the ship was sold on the eighth day of May, 1871. If it had expired, or if it had been discharged before that day, it is useless to examine the other questions raised in the case; for, however they might be determined, the decree made in the court below must necessarily be affirmed.

The repairs having been made upon a domestic vessel in her home port, there was no lien for them by the maritime law, and, therefore, whatever right the appellants had to a lien is that which was given to them by the laws of the State. The statute undoubtedly gives a lien, but not one of unlimited duration. The first section declares that debts contracted for work done or materials furnished in the State, for repairing sea-going or ocean-bound vessels, shall be a lien upon such vessels, and be preferred to all other liens thereon, except mariners' wages. But the second section declares that "such debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall next return to said port.

The repairs in this case were made upon the ship in the month of July, 1870, and on or before the 22d, for the ship cleared on that day, and sailed from the port a day or two afterwards. The lien, therefore, expired in January, 1871, unless the ship was then absent from the port of New York. If she was then absent, the lien expired at the end of ten days after her next return. It does not appear in the record exactly at what time she did return; but, in the petition of the appellants for an appeal to this court, it is averred that she was libelled in the southern district of New York, at the suit of another party, on the 1st of April, 1871, was duly attached, and was sold by virtue of a decree obtained in that case. It is the proceeds of that sale, made May 8, 1871, which are now in the registry of the District Court, and the petition of the appellants for payment out of the proceeds was not presented until May 17. How, then, can it be maintained that the statutory lien for the debt had not expired? It is argued the presumption is that the ten days next after the return of the ship had not elapsed when the appellants filed their petition. Were it possible that any such presumption could be accepted, it would be a presumption of fact, and there is quite enough in the case to overcome it. The ship was libelled in admiralty, as we have noticed, on the 1st of April, 1871. She was duly seized, a decree against her was made, and under it she was sold on the 8th of May. It is hardly possible that the seizure, decree, and sale could have been made within ten days. It could not have been, if in accordance with the usual course of admiralty practice. As the seizure was made in the southern district of New York, it would be an inadmissible presumption that the ship had not returned to the port of New York more than ten days prior to the sale, or certainly more than ten days prior to the 17th of May, when the appellants filed their petition. And this is not all. The evidence shows that, after the return of the ship, the appellants caused an attachment to be issued out of the Supreme Court of New York, in virtue of which the sheriff of the city and county seized the ship, and a satisfactory bond was given, as allowed by the statute of the State, and the ship was discharged. This must have been before the marshal had taken the ship into custody under the process of the Admiralty Court.

The sheriff could not have attached her after the marshal's seizure. It is reasonably clear, therefore, that she had returned to the port of New York more than ten days before she was sold. This is the result of affirmative proof.

But, were there no such proof, the burden of showing the contrary would rest upon the appellants. Six months having expired after the repairs were made to the ship, they had no lien, unless the ship was absent from the port at the expiration of that period, and then only during ten days after her next return. The lien during those ten days was a special privilege given to them by statute, — an exceptional right. Hence, it was incumbent upon them to show that such a right existed, and, by proof, to bring themselves within the exception. This is always the rule when a party claims a peculiar right given by a statute, — a right not common to all, and which is given only when a prescribed state of facts shall exist. Such proof the appellants have not adduced, and, therefore, they have failed to show that their statutory lien had not expired before they presented their petition for payment, and even before the ship was sold.

And were this not so, still, on the facts of the case as exhibited by the record, it must be held that the lien was discharged.

It is almost superfluous to remark, that whatever lien the appellants ever had, they held it subject to all the provisions of the statute which gave it to them. They sued out an attachment against the ship, after her return to New York, for the recovery of the claim they now set up. The ship was seized by the sheriff of the city and county, and, a satisfactory bond having been given according to the provisions of the lien law, the ship was discharged from the custody of the sheriff, and from the attachment. Upon that bond a suit has been brought, which is now pending. The effect of such an attachment and bond is plainly declared by the statute. The twelfth section enacts, that, "upon such bond being executed and delivered to such attaching creditor or his attorney, . . . no further proceedings against the said vessel so seized shall be had under the provisions of this title, founded upon any demand secured by such bond." The bond is thus made a substitute for the lien, and its purpose and effect are to work a discharge of the vessel. It matters not that the statutory provisions for enforc-

ing the lien have been adjudged invalid, because beyond the power of the State legislature. If they are invalid, it may be doubted whether all the provisions purporting to give a lien are not also invalid, because inseparable from the prescribed means of enforcing it. But without deciding that, we may remark, that clearly the State had power to enact that the lien it created should terminate, if a bond was given in place of the vessel; and the creditor claiming the lien must take it, subject to the conditions imposed.

It need hardly be added, that though a proceeding *in rem* and a petition for payment of a claim out of proceeds of a sale remaining in the registry are distinct things, — the former proceeding on the ground of a lien, — yet no one except an owner is entitled to payment out of the registry, unless he has a lien upon the fund therein. The court can marshal the fund only between lien-holders and owners. *Decree affirmed.*

HYDE v. WOODS.

1. A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, — the purchaser not becoming a member, nor having the right to transact business in the board until he shall be elected by ballot, — is neither contrary to public policy, nor in violation of the Bankrupt Act.
2. Membership of the board is not a matter of absolute sale. Although property, it is, when purchased, qualified and incumbered by conditions which the creators of it had the right to impose, and a compliance with which is necessary to obtain it.
3. *Nicholls, Assignee*, v. *Eaton*, 91 U. S. 716, reaffirmed.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. Edward B. Merrill for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The San Francisco Stock and Exchange Board is a voluntary

association for business purposes, organized in 1862, in that city. The membership is elective, with certain provisions for a right to sell and assign the seat, subject to an election of the purchasing member by the board. This is generally done, unless special reasons appear to the contrary; and the result is, that, as the number of members is limited, the right to a seat at the board has a moneyed value. When a member fails to perform his contracts, or becomes insolvent, he can no longer be a member of the board, until he resumes payment; but his seat may be sold for his benefit, or for that of his creditors, among the other members of the board.

Art. 15 of the constitution of the board provides that, "in sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of this board exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

Thomas W. Fenn, who became a member of this board Oct. 21, 1871, was declared a bankrupt Oct. 1, 1872, and plaintiff in error was appointed his assignee. On the twenty-fourth day of August preceding, Fenn became a delinquent, by failing to fulfil his contracts with members of the board, and thereupon made and delivered to defendants in error an assignment of his seat in said board, with authority to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from him to the members of said board. They did sell it for $10,000; the purchaser was duly elected and installed, and the money paid to creditors, who were members of the board, including $2,973.30 to defendants.

Upon these facts, found by the Circuit Court, sitting without a jury, the counsel for plaintiff asks a reversal of the judgment of that court in favor of defendants, on the ground that the assignment by Fenn to the defendants, and their receipt and disbursement of the $10,000, were preferences within the meaning of the bankrupt law, and that they are, therefore, liable to him as assignee for the amount received.

There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any

reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee.

It is very ingeniously argued by counsel for the assignee, that, being property of the bankrupt, he had no right to make the disposition of it which he did, by preferring his creditors who were members of the board to those who were not. The answer to this, so far as Fenn's assignment to defendants is concerned, is, that the part of it which gives this direction to the proceeds of the sale was wholly unnecessary and nugatory; for if the article of the association which we have cited in full was effective, it controlled the disposition of those proceeds; if it is void, or for any other reason ineffectual, then it must be conceded that the assignment of Fenn was an unlawful preference, within the meaning of the bankrupt law. The question turns solely upon the validity of that article of the association.

There is no reason why the stock board should not make membership subject to the rule in question, unless it be that it is a violation of some statute, or of some principle of public policy. It does not violate the provision of the bankrupt law against preference of creditors, for such a preference is only void when made within four months previous to the commencement of the bankrupt proceedings. Neither the bankrupt law nor any principle of morals is violated by this provision, so far as we can see. A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come. As the creators of this right — this property — took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition.

The fundamental vice of plaintiffs' argument is to treat the

case as though Fenn, owning this property absolutely as his own without restriction, had then fettered it, of his own accord, with the condition that it must always stand incumbered by a preferred lien to his fellow-members.

It is said that it is against the policy of the bankrupt law, against public policy, to permit a man to make in this or any other manner a standing or perpetual appropriation of his property to the prejudice of his general creditors; and it is to this point that the numerous authorities of counsel are cited. They all, however, relate to cases where a man has done this with property which was his own, — property on which he himself imposed the direction, or the incumbrance, which impeded creditors.

It is quite different where a man takes property by purchase or otherwise, which is subject to that direction or disposition when he receives it. It is no act of his which imposes the burden. It was imposed by those who had a right to do it, and to make it an accompaniment of any title which they gave to it.

The principle here contended for by counsel was well considered in the recent case of *Nicholls, Assignee*, v. *Eaton*, 91 U. S. 716. In that case, the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground hat this condition was void as against public policy.

But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy.

The case of *Nicholson, Assignee*, v. *Gouch*, 5 El. & Bl. 999, was in many respects very much like the present, the action having been brought to recover certain property which, under

the rules of the exchange, of which the bankrupt was a member, had been received and paid to his fellow-members. This was asserted to be a preference void by the bankrupt law; and the rules of the exchange, under which it was done, were assailed on the same ground taken here. It is true that, in the decision of the Queen's Bench in bank, Lord Campbell, the Chief Justice, ruled against the plaintiff, on the ground that the money in question arose out of wagering contracts, which, as they could not have been enforced by the bankrupt, were, therefore, not subject to the claim of the assignee. But Crompton, J., held, also, that the money being received and distributed under the rules of the stock exchange, by reason of the bankrupt having become a member subject to said rules, this was a sufficient defence to the party who so received and distributed it.

Judgment affirmed.

WAITE v. DOWLEY.

A State statute is not void, which, for the purposes of taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the State to transmit, on or before the fifteenth day of April in each year, to the clerks of the several towns in the State in which any stock or share holders of such bank shall reside, a true list of the names of such stock or share holders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month.

ERROR to the Supreme Court of the State of Vermont.

On the 9th of November, 1865, the legislature of Vermont passed the following act. Acts of 1865, p. 17.

"An Act providing for taxing stock in the several banking associations in this State, formed under the act of Congress approved June 3, 1864, entitled, 'An Act to provide a national currency.'

"SECT. 1. It shall be the duty of the cashiers of the several banking associations in this State, formed under the act of Congress approved June 3, 1864, entitled, 'An Act to provide a national currency,' and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State in which any stock or share holders of such banking association shall reside, a

true list of the names of such stock or share holders on the books of such banking-association, together with the amount of money actually paid in on each share on the first day of April in each year hereafter, on or before the fifteenth day of April in each year.

"SECT. 2. The stock and shares of all such banking associations shall be set in the list, and taxed in the same manner that the stock in the several banks in this State, which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof.

"SECT. 3. If any of the stock of such banking associations is owned by, or stands in the name of, any person residing out of this State, it shall be the duty of the cashier of such banking association to transmit to the clerk of the town in which such banking association is situated, the names of all such non-resident stock or share holders, with the number of shares standing against the name of each of such stock or share holders on the books of such banking association, together with the amount of money actually paid in on each share on or before the fifteenth day of April in each year.

"SECT. 4. Whenever the collector in any town in which any such banking association is situated shall have a tax against any stock or share holder in such banking association who is not a resident of this State, it shall be the duty of the cashier of such banking association, upon presentation of such tax to him by such collector, to pay the same, and charge the same to such stock or share holder on the books of such banking association, and all dividends due and becoming due upon the same shall be holden to such banking association for the payment of such tax.

"SECT. 5. If any cashier shall neglect or refuse to make returns to any town in this State, as provided in this act, he shall forfeit and pay to the treasurer of such town, for the benefit of such town, the sum of $500, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

This action was brought in March, 1870, in the County Court of Windham County, Vermont, by Dowley, as treasurer of the town of Brattleboro', against Waite, the cashier of the First National Bank of Brattleboro', to recover the penalty prescribed by the fifth section of the foregoing act, for refusing, in 1866 and 1867, to make to that town the returns provided for in the first section.

The only defence set up at the trial was, that, as the bank was organized under the law of Congress, Waite, as such cashier,

was amenable to no law but that, and that the State had not power to prescribe or define his duties as such cashier.

Waite also offered evidence tending to show, that, at all times during the years in question, the bank kept such lists of its stockholders as the act of Congress requires, which were open to the inspection of the trustees of said town, who were permitted at all times to transcribe therefrom, and set in the grand list of the town all such stock of said bank as they deemed taxable.

Dowley waived all objection to the admission of the evidence, but claimed that, if admitted, it constituted no legal defence to the action.

The court thereupon directed a verdict for Dowley, which was taken.

To this decision Waite duly excepted; his exceptions were allowed, and the cause passed to the Supreme Court for review.

That court rendered a decision affirming the judgment of the county court, and giving judgment for Dowley against Waite for the amount of the verdict with subsequent interest.

Waite thereupon brought this writ here, assigning for error that the Supreme Court of Vermont erred, —

First, In holding that the statute of the State was valid under the Constitution of the United States, as not repugnant to nor in conflict with the acts of Congress providing for the organization and management of national banks, being the acts of March 25, 1863, and June 3, 1864.

Second, In rendering judgment against him for the penalties provided by a statute which is invalid, as repugnant to and in conflict with said acts of Congress.

Mr. E. J. Phelps for the plaintiff in error.

A long and uniform course of decision in this court has established the proposition, that, in all cases where the State governments have a concurrent power of legislation with the national government, if Congress exercises its power upon the subject, that of the States is excluded. They cannot enter upon the same ground nor legislate for the same object.

Nor is it the question in such cases, whether the two statutes are, in their operation, necessarily repugnant or contradictory to each other. The State cannot legislate at all upon the sub-

ject, except so far as Congress may permit. When once Congress has acted upon it, that action becomes supreme, and all interfering legislation of the States, whether in aid of or in opposition to it, is suspended and prohibited.

It is, therefore, as much beyond the power of a State to impose a penalty for a non-compliance as for a compliance with the requirements of an act of Congress. *Houston* v. *Moore*, 5 Wheat. 1; *McCulloch* v. *Maryland*, 4 id. 316; *Osborn* v. *Bank of United States*, 9 id. 738; *Brown* v. *Maryland*, 12 id. 419; *Weston* v. *Charleston*, 2 Pet. 466; *Dobbins* v. *Erie County*, 16 id. 435; *Gilmore* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 id. 240; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29.

Congress has not only provided how, where, and to what extent shares in national banks may be taxed, but has likewise prescribed the means by which the State authorities shall obtain the requisite information, and imposed upon the bank officers the duty of furnishing it. The whole ground is therefore covered by congressional legislation, the validity of which is not open to question.

The State then interferes; and, in order to tax the shares at a place and in a way not authorized by Congress, imposes upon the bank a new and entirely different duty, under a penalty not provided by Congress, but to be recovered in the State courts, at the suit of the local authorities.

The effect of the Vermont statute is, therefore, not only to alter and extend, in material respects, the provisions of the act of Congress, but to impose a penalty upon the officers of the bank, for not discharging a duty which the act does not require.

The act of Congress of 1864 provides that the shares of stock in the national banks shall be assessed "at the place where such bank is located, and not elsewhere." The act of 1868 was not in force at the dates when Waite refused to furnish the lists.

The second section of the statute provides that the stock and shares of national banks shall be listed and taxed in the same manner as the stock of the banks which are chartered

under the authority of Vermont are liable to be taxed under the State law. That law (Stat. Vt. c. 83) makes all personal property, including stocks, taxable in the town where the owners reside, and not elsewhere.

It is for the purpose of carrying out this method of taxation that the statute requires the cashiers to transmit to the town-clerks of all towns where any stockholders may reside, lists of such stockholders, and of the number of their shares; and, for a neglect or refusal so to do, prescribes the penalty which this suit was brought to recover.

The statute is, therefore, in direct and palpable conflict with the provisions of the act of Congress of 1864 in respect to the place where the shares shall be taxed. Both cannot stand: one or the other must give way.

The validity of a State law, providing for such a mode of taxation prior to the act of 1868, has been twice before this court, — in *Austin* v. *The Alderman*, 7 Wall. 694, and *Tappan* v. *Merchants' National Bank*, 19 id. 490.

It was left undecided, the decision becoming unnecessary. But the language of the court in the latter case clearly indicates their opinion that the State law could not be supported. The imperative and explicit terms of the act of Congress leave no room for the discussion of the question.

In the *City of Utica* v. *Churchill*, 33 N. Y. 161, the Court of Appeals held that the assessment of a shareholder out of the ward in the city where the national bank was located, made in accordance with the laws of New York, was void, because it conflicted with the forty-first section of the act of Congress.

The validity of the statute, in this particular, directly affects the plaintiff in error. It is for a refusal to aid in giving effect to a mode of taxation expressly prohibited by Congress that the penalty has been inflicted, by the rendition of the judgment of which he complains. He is, therefore, entitled to insist upon the invalidity of the statute in respect of the mode of taxation it provides, as well as in respect of the personal duty and penalty it imposes upon him.

Mr. Charles N. Davenport, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Vermont, and, as is frequent in writs to the State courts, it is objected that there is no jurisdiction. The plaintiff in error was cashier of a national bank in that State; and the judgment which this writ brings here for review was rendered against him for penalties imposed by a statute of that State, for his refusal to transmit to the clerk of the town of Brattleboro' a true list of the shareholders of the bank who resided in that town, with the number of shares held, and the amount paid on said shares. The record shows that "the defendant's counsel claimed in defence, that, as said bank was organized under the law of Congress referred to in plaintiff's declaration, the defendant, as such cashier, was amenable to no law but said law of Congress, and that the State legislature had not power to prescribe or define his duties as such cashier." That this proposition raises what is called a Federal question, within the meaning of the act of 1867, admits of no doubt. We are also of opinion that no judgment could have been rendered against the defendant in the State courts, without holding, and in effect deciding, that this plea was bad; for, if the State could not impose the duty of making such a list on the cashier by reason of the act of Congress or the Constitution of the United States, then the defendant was guilty of no offence, and the judgment is for that reason erroneous. This plain proposition cannot be evaded by any opinion delivered by the Supreme Court of that State. This court, therefore, has jurisdiction.

And the single question raised by the record is whether the statute of the State is void which requires the cashier of each national bank within the State, and the cashiers of all other banks, to transmit to the clerks of the several towns in the State in which any stock or share holder of such banking association shall reside, a true list of the names of such stock or share holders, with the number of shares standing against the name of such share or stock holder on the books of such banking association, together with the amount of money actually paid in on such share on the first day of April.

The proposition on which this statute is asserted to be void is that Congress has legislated upon the same subject, and that,

where there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter. It is not necessary to dispute that proposition, nor, when stated in this general language, can it be controverted. It is none the less true, however, that the line which divides what is occupied exclusively by any legislation of Congress from what is left open to the action of the States is not always well defined, and is often distinguished by such nice shades of difference on each side as to require the closest scrutiny when the principle is invoked, as it is in this case.

We have more than once held in this court that the national banks organized under the acts of Congress are subject to State legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation.

This doctrine was clearly and distinctly announced in *National Bank* v. *Commonwealth*, 9 Wall. 353; and that case has been often referred to since, with approval, in this court.

The statute of Kentucky required "the cashier of a bank whose stock is taxed to pay into the treasury the amount of the tax due. If not, he was to be liable for the same, with twenty per cent upon the amount." The stock thus to be taxed was, as in the present case, the stock of the shareholders, as authorized by the act of Congress; and that statute went a step further than to require a list of the names of these shareholders and the amount of their stock, and obliged the cashier to collect the tax out of the dividends, and pay it over to the State.

The precise point raised here was taken there, and overruled by this court; namely, that the laws of the State could impose no such duty on the banks organized under the laws of the United States. The case is directly and conclusively in point.

It seems to have been supposed that, because Congress has required of each national bank that a list of its stockholders shall be kept posted up in some place in their business office,

this covers the same ground as that covered by the Vermont statute.

The act of Congress, however, was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank. It had no such purpose as the Vermont statute, and was wholly deficient in the information needed for the purposes of taxation by the State, as conceded to it by the act of Congress itself.

Some legislation of Vermont was, therefore, necessary to the proper exercise of the rightful powers of the State, and, so far as it required this list, was not in conflict with any provision of the act of Congress.

This leads to the second objection to the validity of the State statute; namely, that its purpose was to tax bank shares at other places than those where the bank was located.

This case does not raise that question.

1. Because the bank whose cashier is the plaintiff in error was located in the town of Brattleboro', and the judgment against him is for refusing to deliver the list of shareholders to the clerk of that town, and not for his refusal to deliver such a list to any other town. The delivery to this clerk of a list of the shareholders in that town would have been in aid of the taxation of the shares at the place where the bank was organized and did business, and such taxation is legal within the narrowest definition of the act of Congress.

2. But if it be true that so much of this statute as is supposed to authorize other towns in which shareholders reside to tax such shares is unconstitutional, that does not invalidate the part of it we have been considering. It will be time enough to decide the provision of the State law authorizing such taxation unconstitutional, when an attempt is made to collect such a tax, and the party resisting it shall bring the question here. His rights are not affected by the acts demanded of the cashier; and the latter has no right to make a case for him in advance. This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it. *Judgment affirmed.*

DOYLE v. CONTINENTAL INSURANCE COMPANY.

1. The court reaffirms the decision in *Insurance Company* v. *Morse*, 20 Wall. 445, that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of Wisconsin, requiring such an agreement, is in conflict with the Constitution of the United States.
2. A State has the right to impose conditions, not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another State, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause.
3. The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the State courts to the Federal courts, the secretary of State should revoke and cancel its license to do business within the State. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the Federal courts, is not accurate. The effect of this decision is that the company must forego such resort, or cease its business in the State. The latter result is here accomplished.
4. As the State has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry.

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

The bill of complaint alleges that the complainant, the Continental Insurance Company of the city of New York, is a corporation organized and existing under the laws of the State of Connecticut, and a citizen of that State.

That prior to the passage of the act of the legislature of the State of Wisconsin, entitled "An Act to provide for the incorporation and government of fire and inland navigation insurance companies," approved March 4, 1870, the complainant had established agencies, opened offices, and made considerable expenditures of money in advertising the business of insurance against loss by fire in the State of Wisconsin. That soon after the passage of said act complainant complied with the provisions of sect. 22 thereof, and procured from the State treasurer and secretary of State the certificates and license to do business in said State as therein provided, and did subsequently fully comply with said act; but that, upon filing appointment of an agent

upon whom process of law could be served, complainant was compelled to add an agreement, on its part, not to remove into the Federal courts suits brought against it in the State courts, which agreement to that effect was made. That after the decision of this court in *Insurance Company* v. *Paige*, 20 Wall. 445, the complainant removed a suit brought on one of its policies against it in the State court, into the Federal court. That because of such removal a demand was made upon the defendant, Peter Doyle, as secretary of State, to revoke the certificate or license authorizing the complainant to do business in said State of Wisconsin.

That complainant had a large number of agencies in the State engaged in the conduct of its business, and a revocation of its license would work great and irreparable injury to the complainant in its business in said State, and the complainant feared that said defendant would revoke said license, unless restrained by injunction. A temporary injunction was issued restraining the defendant from revoking the license of the complainant, because of the removal of said suit from the State to the Federal court.

A demurrer to the bill was overruled, and a decree entered making the injunction perpetual. From this decree the defendant appealed.

Sect. 22, c. 56, Laws of Wisconsin, 1870, provides as follows: —

"That any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial in the United States Circuit or Federal Courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

Sects. 1 and 3, c. 64, are in the following words: —

"SECTION 1. If any insurance company or association shall make application to change the *venue*, or remove any suit or action heretofore commenced, or which shall be hereafter commenced, in any

court of the State of Wisconsin, to the United States Circuit or District Court, or to the Federal court, contrary to the provisions of any law of the State of Wisconsin, or contrary to any agreement it has made and filed, or may make and file, as provided and required by section number twenty-two of chapter fifty-six of the General Laws of Wisconsin for the year A.D. 1870, or any provision of law now in force in said State, or may hereafter be enacted therein, it shall be the imperative duty of the secretary of State, or other proper State officer, to revoke and recall any authority or license to such company to do and transact any business in the State of Wisconsin, and no renewal or new license or certificate shall be granted to such company for three years after such revocation, and such company shall thereafter be prohibited from transacting any business in the State of Wisconsin until again duly licensed."

"SECT. 3. If any insurance company or association shall make application to remove any case from the State court into the United States Circuit or District Court or Federal court, contrary to the provisions of chapter fifty-six of the General Laws of Wisconsin for the year A.D. 1870, or any other State law, or contrary to any agreement which such company may have filed in pursuance of said chapter fifty-six of the General Laws of Wisconsin for the year A.D. 1870, or any other law of the State of Wisconsin, it shall be liable, in addition, to a penalty of not less than $100 or more than $500 for each application so made, or for each offence so committed for making such application, the same to be recovered by suit in the name of the State of Wisconsin; and it shall be the imperative duty of the attorney-general of the State of Wisconsin to see and attend that all of the provisions of said chapter fifty-six of the General Laws of 1870, and the provisions of this act, are duly enforced."

Mr. George B. Smith for the appellant.

Mr. William Allen Butler, *Mr. B. J. Stevens*, and *Mr. I. C. Sloan*, for the appellee.

MR. JUSTICE HUNT delivered the opinion of the court.

The case of *Insurance Company* v. *Morse*, 20 Wall. 445, is the basis of the bill of complaint in the present suit. We have carefully reviewed our decision in that case, and are satisfied with it. In that case, an agreement not to remove any suit brought against it in the State courts of Wisconsin into the Federal courts had been made by the company, in compliance with the Wisconsin statute of 1870. The company, neverthe-

less, did take all the steps required by the United States statute of 1789 to remove its suit with Morse from the State court into the Federal courts. Disregarding that action, the Supreme Court of Wisconsin allowed the action in the State court to proceed to judgment against the company, as if no transfer had been made. When the judgment thus obtained was brought into this court, we held it to be illegally obtained, and reversed it. It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the State courts to the Federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights.

As to the effect of the statutory requirement of the agreement, the opinion, at page 458 of the case as reported, is in these words: —

"On this branch of the case the conclusion is this: —

"1st, The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

"2d, The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed."

The opinion of a court must always be read in connection with the facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the Constitution of the United States and is illegal and void, must be understood as spoken of the provision of the statute under review; to wit, that portion thereof requiring a stipulation not to transfer causes to the courts of the United

States. The decision was upon that portion of the statute only, and other portions thereof, when they are presented, must be judged of upon their merits.

We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State. On the contrary, the case of *Paul* v. *Virginia*, 8 Wall. 168, where it is held that such conditions may be imposed, was cited with approval in *Insurance Company* v. *Morse*. That case arose upon a statute of Virginia, providing that no foreign insurance company should transact business within that State until it had taken out a license, and had made a deposit with the State treasurer of bonds varying in amount from $30,000 to $50,000, according to the amount of its capital. This court sustained the power of the legislature to impose such conditions, and sustained the judgment of the State court, convicting Paul upon an indictment for violating the State law, in issuing policies without having first complied with the conditions required.

Ducat v. *Chicago*, 10 Wall. 410, decided that the statute of the State of Illinois, requiring a license to be taken out by foreign insurance companies, for which six dollars each should be paid, and the filing of an appointment of an attorney, with power to accept service of process, was a legal condition; and a requirement, that, when such company was located in the city of Chicago, it should also pay to the treasurer of that city two dollars upon the one hundred dollars upon the amount of all premiums received, was held to be legal.

In *Lafayette Insurance Co.* v. *French*, 18 How. 404, the court say:—

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence."

Neither did *Insurance Company* v. *Morse*, *supra*, undertake to decide what are the powers of the State of Wisconsin, in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts, or was argued by counsel or referred to in the opinion of the court.

The case now before us does present that point, and with distinctness.

The complainant alleges that a license had been granted to the Continental Insurance Company, upon its executing an agreement that it would not remove any suit against it from the tribunal of the State to the Federal courts; that in the case of Drake it did, on the tenth day of March, 1875, transfer his suit from the Winnebago circuit of the State to the Circuit Court of the United States; that Drake thereupon demanded that the defendant, who is secretary of State of Wisconsin, should revoke and annul its license, in accordance with the provisions of the act of 1872; that it is insisted that he has power to do so summarily, without notice or trial; that the complainant is fearful that he will do so, and that it will be done simply and only for the reason that the complainant transferred to the Federal court the case of Drake, as above set forth.

The cases of *Bank of Augusta* v. *Earle*, *Ducat* v. *Chicago*, *Paul* v. *Virginia*, and *Lafayette Insurance Co.* v. *French*, establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field in the case last named.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Rector* v. *Philadelphia*, 24 How. 300; *People* v. *Roper*, 55 N. Y. 629; *People* v. *Commissioners*, 47 N. Y. 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey* v. *Pegues*, 16 Wall. 244; *Tomlinson* v. *Jessup*, 15 id. 454.

A license to a foreign corporation to enter a State does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and control over its territories, its citizens, and its business, belong to the State.

If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company, to transact its business in Wisconsin, is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.

The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

In all the cases where the legislation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal. Thus, in *Crandall* v. *Nevada*, 6 Wall. 35, a tax was imposed and collected upon passengers in railroad and stage companies.

In *Almy* v. *State of California*, 24 How. 169, a stamp duty was imposed by the legislature upon bills of lading, for gold or silver transported from that State to any port or place out of the State.

In *Brown* v. *The State of Maryland*, 12 Wheat. 419, a license, at an expense of $50, was required before an importer of goods could sell the same by the bale, package, or barrel.

In *Henderson* v. *Mayor of New York*, 92 U. S. 265, the statute required the master to give a bond of $300 for each passenger, conditioned that he should not become a public charge within four years, or to pay the sum of $1.50.

In the *Passengers' Case*, 7 How. 572, the requirement was of a like character.

In all these cases, it was the act or fact complained of that was the subject of judicial injury, and upon the act was the judgment pronounced.

The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State court into the Federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the secretary of State immediately to cancel its license to do business within the State. If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an "inexact statement." The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court.

Decree reversed, and cause remanded with instructions to dismiss the bill.

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE MILLER, dissenting.

I feel obliged to dissent from the judgment of the court in this case.

The following is a brief statement of the reasons for my opinion:—

Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a State is unwise enough to legislate the one, it has no constitutional power to legislate the other. The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or State law precluding them from this right is absolutely void, — just as void as would be an agreement not to resort to the State courts for redress of wrongs, or defence of unjust actions; or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions.

The questions arising upon these Wisconsin laws have already been considered by this court in the case of *Insurance Company* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal courts, was absolutely void. In principle, this case does not differ a particle from that. The State legislation of 1872, under which, and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.

The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not

sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.

The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance, and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations — at least those of a commercial or financial character — should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance.

In my judgment, the decree for injunction ought to be affirmed.

DAVIS v. ALVORD.

1. A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana Territory, and to enforce a mechanic's and laborer's lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and the sale of mortgaged premises. The fact that, according to the modes of procedure adopted in the Territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law.
2. Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and that requires them to prove when the work was commenced, the character of the work, and when it was completed.
3. Work was done by the plaintiff, under a contract with the defendant made Aug. 1, 1869, on two distinct parcels of property situated in Montana Territory, — one a quartz-mill and the other a quartz-mine, — separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870. Nothing was done afterwards, except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due to the plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount as thus apportioned were accordingly filed in the recorder's office. *Held*, 1st, That a lien did not arise from this contract of apportionment, or from the special contract under which the work was done, but from the work itself, which was performed upon the property; 2d, That the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other; 3d, That the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work; and that the occasional repairs subsequently made could not be added to the work done months before, so as to render the whole work one continued performance for which a single lien could be claimed within sixty days after the last repairs; 4th, That it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage.

APPEAL from the Supreme Court of the Territory of Montana.

Mr. R. T. Merrick and *Mr. M. F. Morris* for the appellant.
Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson*, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit to recover a judgment against the defendant, Charles Hendrie, for labor performed by Alvord upon a quartz-mine and a quartz-mill in Montana Territory, of which that defendant is alleged to be part owner, and to enforce a mechanic's and laborer's lien upon his interest in the premises for its payment. It is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. The fact that, according to the modes of procedure adopted in the Territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds be applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law. It is not an uncommon practice in many of the States for the courts to direct, in suits for the foreclosure of mortgages, a formal rendition of judgment for the amount due upon the obligations secured, instead of directing a reference to a master to ascertain and report the amount. *Rollins* v. *Forbes*, 10 Cal. 299. The complaint is not open to objection for misjoinder of causes of action, because the personal judgment and the enforcement of the lien are both prayed for at the same time. The rendition of the judgment is only a mode of judicially declaring the amount due, and in no respect affects the equitable jurisdiction of the court. The case is, therefore, properly brought here by appeal.

It appears from the record, that, on the 1st of August, 1869, the plaintiff entered into a contract with the defendant Hendrie to work for him in erecting and repairing a quartz-mill and in opening and developing a quartz-mine, in Montana Territory, for the sum of $2,500 a year. The mill was distant about a quarter of a mile from the mine, and it was part of the contract that one-half of the time of the plaintiff should be devoted to each.

The erection of the mill was commenced in August, 1869, and occupied about forty days. It was substantially completed in the fall of that year. Some iron guides only were put in during the summer of 1870. After that, nothing was done on the mill, except to make occasional repairs as they were needed.

It does not appear when the work was commenced on the mine. The plaintiff states that, in 1870, he put up steam hoisting-works, laid tracks, and made cars, and did every thing necessary to keep the mine in repair; but as to the commencement of the work in that year he is silent. The notices claiming a lien, and the affidavits attached, are not evidence on this point against the defendants.

The statute was designed to give security to those who, by their labor, skill, and materials, add value to property, by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed is required, except within sixty days after the work is completed. Mortgagees and others acquiring interests in property against which such a lien is sought to be enforced have a right, therefore, to call for strict proof of all that is essential to the creation of the lien; and that includes proof of the commencement of the work, of its character, and of its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for notice of claiming a lien must be filed in the recorder's office within sixty days from that time. This proof must be furnished by the party who asserts the existence of the lien.

From this statement the question as to the priority of the lien claimed by Alvord over the mortgages of the defendant Davis may be readily answered. The work being done on different parcels of property, the lien claimed on one is to be considered separately from that claimed on the other. The parties, the plaintiff and Hendrie, had an accounting on the 25th of June, 1871, when over $3,700 were found due to the plaintiff. It was then agreed between them that this

amount should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount thus apportioned were accordingly filed in the recorder's office on the following day. A lien did not, however, arise from this contract of apportionment, or from the special contract under which the work was done: it arose from the work which was performed upon the property. It is the work of mechanics and laborers, or the material furnished by them or others, by which value is added, or supposed to be added, to property, which creates the lien under the statute, upon notice claiming it being seasonably filed in the proper recorder's office.

So far as the mill was concerned, the notice was filed too late. That building, as already stated, was completed in 1869, or at least in the summer of 1870, when the iron guides were put in. Occasional repairs, if subsequently made (of which, however, the record furnishes no evidence), could not be added to the work performed in the erection of the building months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs.

So far as the mine is concerned, there is no evidence of the time in 1870 when the work upon it commenced. The hoisting-works were put up, the track was laid, and the cars were made some time during that year; but beyond this we are not informed. All this might have been done after the last mortgage held by the defendant Davis was executed and recorded in September of that year. We cannot presume, in the absence of proof to that effect, that the work was commenced before that time, and thus give to the lien for the work priority over the mortgage. The failure of the plaintiff to show the commencement of the work, when the proof of that fact was within his power, leads to the conclusion that the truth would not have subserved his interests. At any rate, as the case stands, there is nothing in the record which warrants a subordination of the interests of the mortgagee to the claim of the plaintiff. The finding of the District Court, that one-half of the amount due to the plaintiff was a valid lien on the mine from Aug. 1, 1869, and the other half a lien on the mill from that date, does not help the case; for that finding is only a conclusion

of law. No facts are stated upon which the conclusion can be sustained.

Whilst the statute giving liens to mechanics and laborers for their work and labor is to be liberally construed, so as to afford the security intended, it cannot be too strongly impressed upon them, that they must not only bring themselves by their notices, as was done in this case, clearly within the provisions of the statute, but they must be prepared, if the priority of their lien be disputed, to show a compliance with those provisions, and to fix with certainty the commencement and completion of their work; in which particulars the proof here is wanting.

The decree of the District Court of the Territory must, therefore, be modified so as to give the mortgages held by the defendant Davis a priority over the lien of Alvord in the distribution of the proceeds arising upon the sale of the interest of the defendant Hendrie; and the cause will be remanded to the Supreme Court of the Territory, with directions to modify the decree in that respect; and it is *So ordered.*

SOUTHERN EXPRESS COMPANY *v.* DICKSON.

An express company, well knowing that certain goods, received by it for transportation to a place mentioned in its receipt, were the property of the shipper, delivered them, without his knowledge, to a third person, at the place of shipment, on the order of the consignee. *Held*, that the company was liable to the shipper for the value of the goods.

ERROR to the Circuit Court of the United States for the Southern District of Alabama.

The facts are stated in the opinion of the court.

Mr. Clarence A. Seward, for the plaintiff in error.

Mr. Conway Robinson and *Mr. Leigh Robinson*, *contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

The case, in brief, is this: The agent of the plaintiff Dickson delivered to the express company at Greensboro', N. C., fifty-two boxes of tobacco, to be shipped to Columbia, S. C. The boxes were consigned to Trent & Rea at that place, and the delivery to the company for shipment was made by Trent, one

of that firm, who at the time informed the company that the tobacco was the property of the plaintiff. A written receipt was given by the company in the usual form. The boxes never left Greensboro', but were, without authority of the owner, sold by Trent to one Mendenhall, to whom, by the order of Trent, they were delivered by the company at Greensboro'.

The court charged the jury, that, if they believed from the evidence that the tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that fact was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, S. C., the defendant was not authorized to deliver the same to the consignees, or either of them, or to any other person by the order of either of them, at Greensboro', N. C., the place of shipment; and such delivery at Greensboro', N. C., without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff. To which charge of the court the defendant then and there excepted.

There was a verdict for the plaintiff, on which judgment was rendered, and the defendant sued out this writ of error.

By various requests to charge, the defendant presented the point in different forms, but the question of law is clearly indicated by the charge given. The express company is not liable in this action, if, upon the order of Trent, it was justified in delivering the property at the place of its intended shipment. If it was not so justified, but was bound to transport and deliver as agreed in its receipt, or to deliver to the owner, then it is liable, and the judgment should be affirmed.

We are not called upon to question the proposition that a consignee of goods is for many purposes deemed to be the owner of them, and may maintain an action for their non-delivery. 1 Pars. Ship. 269. In the case before us, the proof was given; and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. The question is, rather, where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a

distant place, can the carrier deliver the goods to such consignees or to their order at another place, or without starting them on their journey? We think the rule is, that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different. This is illustrated by the case of *Thompson* v. *Fargo*, 49 N. Y. 185. Thompson had, as the agent of White, collected certain moneys belonging to White, and, inclosing them in a package directed to White at Terre Haute, Ind., sent the package from Decatur, in the same State, by the express company. Various attempts were made to deliver the package to White, but he could not be found; and Thompson, the shipper, at length demanded the return to him of the package, and, on refusal, brought an action to recover its value. The Court of Appeals of New York held, that, if the case had been one of a sale by the consignor, with no directions from the consignee how to ship the goods, the former, as the title would remain in him, might maintain an action, but not when he was the mere agent, having no interest in the property, but acting pursuant to the orders of the owner in shipping it; that a delivery to him would be no defence to an action by the owner. The case of *Duff* v. *Budd*, 3 Brod. & B. 177, holds the same rule.

The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. In addition to those authorities, reference may be had to *Sweet* v. *Barney*, 23 N. Y. 335, where a bank in the interior of New York sent by express a package of money directed to "The People's Bank, 173 Canal Street, New York." The package was delivered to an agent of the People's Bank

at the office of the express company, and was stolen from such agent. The bank in the interior brought its action against the express company, and the question was, whether the express company was authorized to deliver the package at any other place than 173 Canal Street. The court held, that as there was no notice to the express company that the money was not the property of the People's Bank, in the city of New York, nor any circumstances to weaken the presumption that the money belonged to that bank, any delivery that was good as to that bank discharged the carrier.

Of the character mentioned is the case of *London & Northwestern Railway Co.* v. *Bartlett*, 7 N. & H. 400, which is much relied on by the plaintiff in error. The consignee in that case was the purchaser of the wheat in question, and consequently any delivery to him, or his order, wherever it might be, would be a discharge to the carrier.

The same fact existed in *Mitchell* v. *Ede and Others*, 11 A. & E. 888. The plaintiff recovered the value of the sugars shipped from Jamaica, for the reason that, under the circumstances stated, he was held to be the owner of them. Upon the same principle is *Foster* v. *Frampton*, 6 B. & C. 107, where the goods were received from the carrier by the actual vendee, and it was held that the *transitus* was at an end.

We do not perceive any thing adverse to the principles we have stated in the learned opinion delivered by Chief Justice Shaw in *Blanchard* v. *Paige*, 8 Gray (Mass.), 285, nor in *Lee* v. *Kimball*, 45 Me. 172, which holds that where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended.

We base our judgment upon the bill of lading and its legal results, adopting the fifth point of the plaintiff in error, that any antecedent agreement or understanding was merged therein and extinguished thereby. The circumstances of the shipment, how and by whom made, and the knowledge of the ownership, were proved without objection. These circumstances, and the bill of lading adopted and claimed by the plaintiff, and the point raised by the exception to the charge of the judge, present the question we have discussed, and no other.

The plaintiff in error now contends in his eleventh point that Dickson was not the owner of the tobacco. This point cannot be raised here. No request or exception was made which involves the question. The ownership was assumed throughout the trial, in the charge of the judge, not disputed in the requests to charge, and if a subject of doubt in any form, must be considered as settled by the verdict. The only suggestion of a denial of ownership is in the request to charge, that, if the tobacco was in the possession of Trent, as agent of Dickson, or otherwise, then the delivery to him or his order was lawful. To hold this to be a denial of the ownership of Dickson, or a claim of ownership by Trent, would go far beyond any reasonable construction.

We see no error in the rulings at the trial, and are of the opinion that the judgment should be affirmed.

It is so ordered.

DUTCHER v. WRIGHT.

1. In computing the four months before filing the petition in bankruptcy, within which time the assignment of his property by an insolvent debtor, with a view to give a preference to any creditor, is void, the day upon which the petition is filed must be excluded.
2. *Toof et al.* v. *Martin*, 13 Wall. 40, and *Buchanan* v. *Smith*, 16 id. 277, cited, and the doctrines therein announced applied to the facts of this case.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. W. P. Lynde for the appellant.

Mr. E. Mariner, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Transfers of property by an insolvent debtor, within four months before the filing of the petition in bankruptcy against such debtor, with a view to give a preference to any creditor, is forbidden by the Bankrupt Act; and the provision is to the effect that if any such insolvent debtor, within that period and with that view, procures or suffers his property, or any part

thereof, to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of his property, within that period and with that view, the attachment or seizure and the payment, pledge, assignment, transfer, or conveyance shall be void, if the person receiving the same, or to be benefited thereby, had reasonable cause to believe that such debtor was insolvent, and that such attachment, payment, pledge, assignment, or conveyance was made in fraud of the provisions of the Bankrupt Act. 14 Stat. 534; Rev. Stat., sect. 5128.

Congress has also defined the meaning of certain terms employed in the Bankrupt Act, and has regulated the mode of computing time "in all cases in which any particular number of days is prescribed by the act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under the same, for the doing of any act or for any other purpose," the rule enacted being that the computation "shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall" be *dies non* within the judicial sense. Rev. Stat., sect. 5013, p. 974.

Most of the matters of fact material to the decision of the case are either admitted, or so fully proved that they may be regarded as without dispute. Peterson, being insolvent, was, on the 8th of April, 1870, adjudged bankrupt, pursuant to his own petition filed in the District Court for the District of Minnesota. Prior to that time he had long been engaged in trade, doing business as a merchant in Rochester, in that State. Sufficient appears also to show that the respondents were engaged in trade, doing business as wholesale merchants under the firm name of Dutcher, Ball, & Goodrich, at Milwaukee, in the State of Wisconsin; that the said Peterson, on the 8th of December next before the time he was adjudged bankrupt, and long before that time, was insolvent, and largely indebted to the respondents for goods, wares, and merchandise theretofore sold and delivered to the bankrupt at his aforesaid place of business; and that the bankrupt did then and there, to wit, on the said 8th of December, with the knowledge, assent, and procurement of the respondents, assign, transfer, and con-

vey to the said respondents certain portions of his property, consisting of promissory notes, securities, mortgages, and other evidences of indebtedness, with a view to give a preference to the respondents over the other creditors of the bankrupt, and in fraud of the provisions of the Bankrupt Act.

Proof of a satisfactory character is exhibited in the record to show that the assignment, transfer, and conveyance of the said securities and property were made to the respondents with a view to secure to them a preference over the other creditors of the bankrupt; and that the respondents had reasonable cause to believe that the assignor, transferrer, and grantor was then and there insolvent, and that the assignment, transfer, and conveyance of the securities and property were made in fraud of the provisions of the Bankrupt Act and to prevent the said securities and property from coming to the possession of the assignee of the bankrupt debtor for distribution among his creditors, as required by law.

What the complainant charges is, that the securities and property transferred, assigned, and conveyed to the respondents belonged to him as the assignee of the bankrupt; and he prays for an account, and that the moneys collected be paid to him as such assignee, and that the securities uncollected be turned over to him, for the benefit of the creditors of the bankrupt.

Process was served; and the respondents appeared and pleaded the following defences: 1. That the securities and property were not transferred, assigned, and conveyed within four months next before the petition in bankruptcy was filed. 2. That the respondents were not served with process within two years from the time the cause of action accrued. 3. That the District Court for the District of Minnesota had exclusive jurisdiction of the cause of action set forth in the bill of complaint.

Instead of replying to the plea, the complainant under the rule in that behalf obtained an order setting it down for hearing at the next term; and the parties at the time appointed were fully heard, and the court overruled the several defences set up in the plea.

Pursuant to leave, the respondents filed an answer to the effect following, reference being first made to the admissions

which the answer contains: 1. They admit that the insolvent debtor was adjudged bankrupt on the day alleged in the bill of complaint, and that the complainant was duly appointed the assignee of the bankrupt's estate, as therein alleged; that an assignment of his estate was in due form made to the complainant, as assignee of the bankrupt's estate, and that the same became duly vested in him as such assignee; that the bankrupt was, on that day, indebted to the respondents in the sum of $1,741.12, for goods, wares, and merchandise which their firm had previously sold to the bankrupt.

None of these facts are controverted; and it is also admitted that one of the respondents, on the same day, had an interview with the bankrupt at the office of an attorney in the town where the bankrupt resides, in relation to his indebtedness to their firm, for the purpose of adjusting his indebtedness; and that the bankrupt on that day gave the respondents' firm a note for the amount of his indebtedness to the firm, and that he assigned to the firm the notes and accounts against his customers specified in the schedule exhibited in the record, and placed the same in the hands of the said attorney for collection as collateral security for the note given to the firm, the balance, if any, after paying the note and the expense of collecting the collaterals, to be paid over to the bankrupt.

These collaterals, it is admitted, greatly exceeded the amount of the bankrupt's indebtedness to the respondents; but they allege as matter of defence that they had no reasonable cause to believe, at the time of taking the same, that their debtor was insolvent or unable to pay his debts, and aver that their partner, when he made the arrangement, acted in good faith, and in the full belief that the bankrupt had assets sufficient to pay all he owed, and leave him a surplus of $12,000 to $13,000; that he was then in the possession of a valuable stock of dry-goods and groceries; and that, from inquiries their partner made of the debtor and the attorney with whom the collaterals were deposited for collection, he, the partner, believed that the debtor had sufficient available assets to pay all his debts, and to leave him a good surplus.

Beyond all doubt, the debtor was then insolvent; and it does not appear that the respondents or the active partner made any

inquiries as to his pecuniary standing, except of the national bank, where he was owing $1,700, and of the debtor and the depositary of the notes and accounts assigned as collaterals; and they admit in the answer that their partner, in order to perfect the arrangement, found it necessary to hold out the inducement to the debtor, that, if he did not pay or secure what he owed the firm, they would be obliged to sue their claim, and collect the same by due process of law. Aided by such inducements, the partner succeeded, and was permitted to take enough of the debtor's notes and accounts to pay the claim of the firm in full, and the expenses of collecting the notes and accounts, with the understanding that the excess, if any, should be delivered back to the debtor. Times became hard with the debtor early in May preceding the arrangement, as appears by the correspondence exhibited in the record, from which it may reasonably be inferred that the firm were resolved to obtain security, or to enforce payment by legal proceedings.

Insolvency, in the sense of the Bankrupt Act, means that the party whose business affairs are in question is unable to pay his debts as they become due, in the ordinary course of his daily transactions; and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature, in the ordinary course of his business. *Buchanan* v. *Smith*, 16 Wall. 308; *Toof et al.* v. *Martin*, 13 id. 40.

Reasonable cause for such a belief cannot arise unless the fact of insolvency actually existed; but if it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry. *Scammon* v. *Cole*, 5 N. B. Reg. 268; *Wilson* v. *City Bank*, 17 Wall. 487.

Witnesses were examined, the parties were heard, and the

court entered a decree in favor of the complainant; and the respondents appealed to this court.

Certain important findings of fact are set forth in the interlocutory decree, as follows: 1. That the debtor, on the 8th of December, 1869, was insolvent. 2. That the respondents then and there had reasonable cause to believe that he was insolvent, and that the assignment of notes and accounts set forth in the answer was made by the debtor when insolvent, and with a view to give a preference to the respondents as his creditors, and that they then and there had reasonable cause to believe that the assignment was made in fraud of the provisions of the Bankrupt Act.

Suffice it to say that the proofs and the admissions contained in the answer are sufficient to show that the findings of the Circuit Court are correct, and that the decree there rendered should be affirmed, unless the defences set up in the plea, or some one of them, can be sustained. Defences of the kind are not waived by filing an answer to the merits. They were all presented in one plea, but they will be separately considered in the reverse order from which they are set forth in the plea.

1. Suits may be instituted and prosecuted to final judgment by an assignee in bankruptcy to recover the assets of the bankrupt in the Circuit or District Court in a district other than that in which the decree in bankruptcy was entered, which is all that need be said in response to the objection that the District Court, where the suit in this case was commenced, had no jurisdiction to maintain the suit. *Shearman* v. *Bingham*, 7 N. B. Reg. 490; *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516.

2. Assignees have two years from the time the cause of action accrued within which to enforce such a claim, and, inasmuch as the suit in the court below was instituted within that time, the plea of limitation must be overruled. 14 Stat. 518.

3. Suppose that is so, still it is insisted by the respondents that the notes, accounts, and property were not assigned to them within four months before the petition in bankruptcy was filed in the District Court by the insolvent debtor. Both parties agree that the petition in bankruptcy was filed April 8, 1870, and it appears both by the bill of complaint and the plea

filed by the respondents that the notes, accounts, and property were assigned by the bankrupt to the respondents the 8th of December of the preceding year. Undisputed as the facts are, the decision must turn upon the construction of the Bankrupt Act. 14 Stat. 534; Rev. Stat., sect. 5128.

Taken literally, it might be suggested that the phrase, "four months before the filing of the petition," would exclude the day the petition was filed, fractions of a day being forbidden in such a computation; nor would it benefit the respondents if the rule prescribed by sect. 5013 of the Revised Statutes should be applied, which is, that in all cases in which any particular number of days is prescribed in that title, or shall be mentioned in any rule or order of court, or general order, which shall at any time be made under the same for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day.

Where the phrase to be construed does not contain any expression to the contrary, the enactment is that that rule shall apply, leaving it to be understood that the phrase to be construed may contain words prescribing its own rule in that regard, and that if it contains any inconsistent expression to the contrary, that the rule prescribed in that section shall not necessarily control the meaning of the phrase to be construed.

Apply that qualification to the rule prescribed in sect. 5013, and still it might be suggested that the meaning of the phrase, "within four months before the filing of the petition," is entirely consistent with that rule.

Unless the day when the notes, accounts, and property were assigned, and the day when the petition in bankruptcy was filed, are both included in the computation, the defence fails, and the complainant is entitled to an affirmance of the decree. Neither argument nor authority is found in the brief of the respondents supporting any such rule of construction, and it is believed that no decided case can be referred to, where such a theory was ever adopted. Decided cases may be found in which it is held, where an act is required by statute to be done a certain number of days at least before a given event, that the time must be reckoned, excluding both the day of the act and that of

the event. *The Queen* v. *The Justices*, 8 Ad. & E. 178; *Mitchell* v. *Foster*, 12 id. 172; *Zouch* v. *Empsey*, 4 B. & Ald. 522.

Search has been made in vain for a decided case in which it is held that both the day of the act and the day of the event shall be included in the computation, in order to ascertain the specified period of time. Cases may be found in which it is held, that, where the computation is to be made from an act done, the day on which the act is done is to be included. *Arnold* v. *United States*, 9 Cranch, 120.

Exceptions undoubtedly exist to that rule, and it must be admitted that there are many cases in which it is held that the last day is included and that the first is excluded.

Speaking of the conflict of judicial decision upon the subject, Lord Mansfield said that the cases for two hundred years had only served to embarrass a point which a plain man of common sense and understanding would find no difficulty in construing, and he came to the conclusion that courts of justice ought to construe the words of parties so as to effectuate their deeds and not destroy them, and that "from the date" may, in popular use and even in strict propriety of language, mean either inclusive or exclusive. *Pugh* v. *Leeds*, Cowp. 714.

Special reference was made to that decision in the case of *Griffith* v. *Bogert*, 18 How. 158, in which this court held to the effect that the general rule is to treat the day from which the period of time is to be calculated, or *terminus a quo*, as inclusive, and they applied that rule in the decision of that case; but they remarked in the opinion that "every case must depend on its own circumstances." Thirty years before that, the Supreme Court of New York decided that it was the practice of that court, where an act is to be done within a specified number of days, to consider the day on which notice is given and the day on which the act is to be done, the one inclusive and the other exclusive, without any particular designation that the one or the other shall be exclusive. *Gillespie* v. *White*, 16 Johns. (N. Y.) 120.

Three of the courts of England, — to wit, the King's Bench, the Common Pleas, and the Exchequer, — forty-five years ago, adopted the following rule to regulate the practice in those courts: "That, in all cases in which any particular number of

days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to" be *dies non* in legal contemplation. 8 Bing. 307.

Repeated attempts have been made to settle the question, but different rules still prevail in different jurisdictions.

Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled. Still it must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases, nor is it necessary to make the attempt in this case, as the court is unanimously of the opinion that the day the petition in bankruptcy was filed must be excluded in making the computation, and that the decree of the Circuit Court is correct. Rev. Stat., sect. 5018. *Decree affirmed.*

ÆTNA LIFE INSURANCE COMPANY *v.* FRANCE.

1. The relationship between a party and another for whose benefit he effects an insurance upon his life, if a good and valid consideration in law for any gift or grant, furnishes no ground for the imputation that the transaction was by way of cover for a wager policy.
2. A policy of insurance, taken out by a man upon his life for the benefit of his sister, who has no insurable interest in his life beyond that of relationship, is not void; and it is immaterial what is the arrangement between them for the payment of the premiums.
3. Where, as in this case, the policy makes the declaration, the questions set forth in the proposal and the answers to them, a part of the contract, and declares, that, if they are found in any respect to be false and fraudulent, it shall be void, the court below did not err in charging the jury, that, where the answers were qualified by the statement of the applicant that they were as nearly correct as he could remember, the right to recover would not be defeated, unless the jury were satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Samuel C. Perkins for the plaintiff in error.
Mr. Nathan H. Sharpless, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This action was brought by David France and Lucetta P., his wife, to recover the amount of a policy of insurance for $10,000, issued by the Ætna Life Insurance Company on the life of Andrew J. Chew, of Philadelphia, dated Sept. 13, 1865, and payable to the said Lucetta, who was Chew's sister.

The proposals for the insurance, made out upon one of the printed blanks of the company, were signed by both Chew and Mrs. France. The following is a copy of the introductory part of the policy: —

"This policy of insurance witnesseth, that the Ætna Life Insurance Company, in consideration of the sum of $243.50, to them in hand paid by Andrew J. Chew, for the benefit of Lucetta P. France, his sister, and of the annual premium of $243.50, to be paid to said company on or before the thirteenth day of September in every year during the continuance of this policy, do assure the life of Andrew J. Chew, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, in the amount of $10,000 for the term of his life.

"And the said company do hereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said assured, her executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Andrew J. Chew, and in either case all indebtedness of the party to the company shall be deducted from the sum insured. If any notes given by the said Andrew J. Chew for any portion of the cash part of premium on the within policy for any current year shall mature and not be paid, the policy shall become void from that date, and all payments of premium thereon forfeited to said company."

The policy, amongst other things, contained the following stipulation: —

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing date the thirteenth day of September, 1865, and which are hereby made part and parcel of

this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The trial resulted in a verdict and judgment for the plaintiffs. The defendant sued out this writ of error.

Numerous exceptions were taken, on which errors are assigned here; but they are all reducible to two heads, or grounds of defence, viz.: 1. Want of insurable interest in Lucetta P. France; 2. Misrepresentation and breach of warranty as to the age and health of said Chew. It is insisted that the rulings and charge of the court below on these points were erroneous.

First, On the question whether Lucetta P. France had an insurable interest in the life of Chew, the conceded facts are that she was his sister, as stated in the policy; that, at the time the policy was issued, she was married to the other plaintiff, David France, and in no way dependent on her brother for her support; that the latter was earning his living as a ladies' shoemaker, and was of small means. Evidence was given tending to show that Mrs. France had, at different times, loaned money to her brother to an amount of some $2,000, and lent him $400 more in September, 1865; that a previous policy of like amount with the present had been obtained of the defendant company on Chew's life for his sister's benefit in June of the same year, and that at the time of issuing the policy now in suit he was unmarried, but was engaged to be married, and was in fact married the next day. The policy, as well as the several receipts for the annual premiums, signed by the secretary of the company, and countersigned by its agent in Philadelphia, all acknowledge that said premiums were received from Chew.

The construction given to the policy by the court below was, that it was a contract between the company and Chew for an assurance of his life, with a stipulation and agreement that the money should be paid to his sister; and the court held that such a policy is sustainable at law on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time the insurance was effected, was one of Chew's next of kin, prospectively interested in his estate as a distributee. We concur in the construction of the policy made by the court, and in the validity of the transaction. As held

by us in the case of the *Connecticut Mutual Life Insurance Company* v. *Schaefer*, *supra*, p. 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment.

The insurance company gave in evidence three promissory notes given by Lucetta P. France herself for part of the last three premiums paid on the policy, and requested the court to charge, that if the jury believed that the premiums on the policy were paid by Lucetta P. France, whether in cash or by her notes, there was evidence from which they could find that the application for insurance was made and the policy in question taken out by her for her own benefit; and, if such was the case, she must show an insurable interest in the life of her brother, beyond that of mere relationship, before she could recover. The court refused so to charge; and, we think, rightly. Waiving the question, whether, merely as sister of Chew, Mrs. France could have effected in her own name an insurance on his life, without its being obnoxious to the charge of a wager policy, the evidence was incompetent to prove the fact sought to be proved by it. The company, when taking the notes in question, acknowledged the premiums to have been received from Chew, and was estopped from going behind its own admission, under the circumstances of the case. The contract of insurance, as correctly construed by the court, was made with Chew; and the relationship of the parties was such as to divest the assignment of the policy or the direction of its payment to his sister of all semblance of a wagering transaction. Under the circumstances, it matters not if the money or notes required for paying the premium did come from Mrs. France; at most, it was by way of advance on her brother's account, and on his contract. He had a right to take out a policy on his own life for his sister's benefit; and she had a right to advance him the necessary means to do so. As between strangers, or persons not thus nearly connected, such a transaction would be evidence to go to the jury,

from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. But as between brother and sister, or other near relations, desirous of thus providing for each other, and, as said by Chief Justice Shaw, presumed to be actuated by "considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law" (*Loomis* v. *Eagle Life Ins. Co.*, 6 Gray, 399), the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground we hold, that where, as in this case, a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums, it cannot justly refuse to pay the insurance when incurred by the terms of the contract.

Second, The other exceptions relate to alleged misrepresentations by Chew in the proposal for insurance. The policy makes the proposal and the answers to the questions therein a part of the contract, and declares that if they shall be found in any respect false or fraudulent, the policy itself shall be void. Among the questions are the following, with the answers given to each respectively: —

"'4. Place and date of birth of the party whose life is to be insured?' *Ans.* 'Born in New Jersey, in 1835.'

"'5. Age and next birthday?' *Ans.* 'Thirty years, Oct. 28, as near as I can recollect.'

"'11. Has the party ever had any of the following diseases; if so, how long, and to what extent: palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, . . . rupture, convulsions, &c.?' *Ans.* 'None.'

"'12. Is the party subject to habitual cough, dyspepsia, &c.?' *Ans.* 'No.'

"'13. Has the party had, during the last seven years, any severe disease? If so, state the particulars, and the name of the attending physician. *Ans.* 'No.'"

The answers were followed by this qualification: "The above is as near correct as I remember."

The defendant offered evidence tending to show that Chew, at the time of the application, would have been thirty-five or thirty-seven years old at his next birthday, instead of thirty, and that he was born Oct. 28, 1828; and that he had been ruptured from infancy, and so continued up to the date of the application, and wore a truss; and that he had had consumption, or some disease of the lungs; and that he was subject to habitual cough and dyspepsia; and had been attended by physicians for severe disease within seven years; and that he knew all of these matters at the time of the application. Counter evidence was given on the part of the plaintiffs. Among the proofs of death was an affidavit of the widow of Chew, stating that he was born Oct. 28, 1828, which defendant relied on as to the point of age. Mrs. France denied all knowledge of the papers received by defendant as proof of loss, except her own affidavit; and as to the alleged rupture, called, amongst others, Dr. Lewis, as an expert, and proposed to him the question, whether the existence of a reducible rupture in a subject of life assurance in his opinion appreciably increased the risk of the underwriters? The question was objected to, but allowed.

The defendant asked the court to charge, that if any of the answers were untrue, in whole or in part, the verdict must be for the defendant. The court charged that the truth or falsehood of the answers materially affected the risk; but added: —

"But the answers here are qualified by the words appended at the foot of the application, 'the above is as near correct as I remember,' which are applicable to all the statements made by the assured. He must be understood, therefore, as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of his answers would avoid the policy, irrespective of his motive, because he warranted their truth; with it, the plaintiffs' right to recover will not be defeated, unless it appears that some one of the answers was consciously incorrect.

"To avoid the policy, then, the jury must be satisfied that the

answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness."

And, in particular, as to Chew's representation of his age, the court charged, "that if he knew, or had reason to believe, that the year of his birth, as stated in the answer, did not correctly indicate his age, the policy is void, and the plaintiffs are not entitled to recover."

We think the qualification made by the court was entirely justified by the form in which the answers were given. If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application. Having accepted it, they were bound by it.

As to the diseases inquired about, the court charged substantially to the same effect; namely, that the answers called for were material, and if untrue, and Chew knew or had reason to believe them so, the policy was void. As to the alleged rupture, in particular, the court said: —

"If, however, it appears that the rupture had been completely reduced, so that its effects had entirely passed away, and it had ceased to affect his health or impair his capacity to take fatiguing and prolonged exercise, the jury will determine whether the answer is untrue as nearly as he could remember. On the other hand, if the rupture had not been cured, it is hardly presumable that he could have forgotten it at the time of the application; and if the jury so find, it was his duty to disclose the fact that he had been afflicted with this disease, and his negative answer will avoid the policy."

And so of the rest. We think the charge was a fair one, and gave the defendant the full benefit of any falsity contained in the answers given by the applicant. Under the charge as given, we do not see how the evidence of the physician, even if irrelevant, could injure the defendant.

Other points were raised, but it is unnecessary to discuss them. From a careful examination of the whole case, as presented, we are satisfied that there is no error in the record.

Judgment affirmed.

MERRILL v. YEOMANS.

Letters-patent No. 90,284, issued to Joshua Merrill May 18, 1869, for improved manufacture of deodorized heavy hydrocarbon oils, construed and held to be good for the superheating coil, with its steam-pipe, &c., referred to in the second claim of the specification, and for the described process by which the oil is deodorized, but not for the product of that process.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This is a suit by Joshua Merrill, for an infringement of letters-patent No. 90,284, issued to him May 18, 1869, for improved manufacture of two deodorized heavy hydrocarbon oils. The court below found that there was no infringement by the respondents, and dismissed the bill; whereupon the complainant appealed here.

Mr. Charles M. Reed and *Mr. Chauncey Smith* for the appellant.

Mr. Causten Browne, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant in this case, who was complainant in the Circuit Court, obtained a patent, in May, 1869, for a new and useful invention, which relates to the heavy hydrocarbon oils; and he sued the appellees, who were defendants in that court, for an infringement of his patent.

The defendants were dealers in oils, and not manufacturers of them. If the appellant's patent was for a new oil, the product of a mode of treating the oils of that character which he describes in his application, the defendants may be liable; for they bought and sold, without license or other authority from him, an oil which is proved to be almost if not quite identical with the one which he produced. If, however, appellant's patent is only for the mode of treating these oils invented and described by him, — in other words, for his new process of making this new article of hydrocarbon oil, — then it is clear the defendants have not infringed the patent, because they never used that process, or any other, for they manufactured none of the oils which they bought and sold.

The counsel for appellant here maintain that his patent is for the new article, and is not for the process, though he describes it fully, by which that article is produced. The appellees insist, with equal earnestness, that the patent is exclusively for the process by which the new oil is made.

The issue thus presented must be decided solely upon a correct construction of the plaintiff's patent, and the accompanying specifications, in which, as required by the act of Congress, he makes the statement of his invention.

No such question could have arisen if appellant had used language which clearly and distinctly points out what it is that he claims in his invention.

We use the word "claim" as distinct from "description." It must be conceded that the appellant's specification describes with minuteness and precision both the instrumentality and the process by which he makes the oil in question. And in regard to a part of the apparatus which he uses, he makes a distinct claim for its invention; and that is not in dispute here. He also describes with fulness and accuracy the process of distillation by which he produces this oil. He gives the temperature to be used, the mode of heating, the degree of rapidity or delay to be used in distilling, the introduction, and the advantage of that introduction, of superheated steam into contact with the oils to be distilled during the process.

He also describes, though in short terms, the article produced, the main feature of which he declares to be its freedom from the offensive odor which, before his invention, seemed to be an inseparable quality of those oils; and he mentions some of the more important uses to which this deodorized oil is applicable in the arts.

It is fairly to be inferred from this statement, that, if all which is described as new in these specifications is really so, the inventor has a right to a patent for three inventions: —

1. For a modification or improvement in the distilling apparatus.

2. For a new process or mode of distilling heavy hydrocarbon oils, by which they are deprived of their offensive odors.

3. For the product of this new process of distillation; namely, the deodorized heavy hydrocarbon oils fitted for use in the arts.

When a man supposes he has made an invention or discovery useful in the arts, and therefore the proper subject of a patent, it is, nine times out of ten, an improvement on some existing article, process, or machine, and is only useful in connection with it. It is necessary, therefore, for him, in his application to the Patent Office, to describe that upon which he engrafts his invention, as well as the invention itself; and, in cases where the invention is a new combination of old devices, he is bound to describe with particularity all these old devices, and then the new mode of combining them, for which he desires a patent. It thus occurs that, in every application for a patent, the descriptive part is necessarily largely occupied with what is not new, in order to an understanding of what is new.

The act of Congress, therefore, very wisely requires of the applicant a distinct and specific statement of what he claims to be new, and to be his invention. In practice, this allegation of the distinct matters for which he claims a patent comes at the close of the schedule or specification, and is often accompanied by a disclaimer of any title to certain matters before described, in order to prevent conflicts with pre-existing patents.

This distinct and formal claim is, therefore, of primary importance, in the effort to ascertain precisely what it is that is patented to the appellant in this case.

In this part of his application he makes two separate claims, the second of which relates to a modification of the distilling apparatus, and is not in dispute here. Turning our attention to the first claim, we are compelled to say that the language is far from possessing that precision and clearness of statement with which one who proposes to secure a monopoly at the expense of the public ought to describe the thing which no one but himself can use or enjoy, without paying him for the privilege of doing so. It is as follows: —

"I claim the above-described new manufacture of the deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils, and having a slight smell like fatty oil, from hydrocarbon oils, by treating them substantially as is hereinbefore described." The word "manufacture" in this sentence is one which is used with equal propriety to express the process of

making an article, or the article so made. "The manufacture of hydrocarbon oils" means primarily the making of hydrocarbon oils. It may mean the thing made also. Are there other words in the sentence calculated to throw light on the meaning of this one?

"I claim the above-described new manufacture of hydrocarbon oils, . . . by treating them substantially as hereinbefore described." It seems to us that the most natural meaning of these words is, that "I claim this new mode of manufacturing hydrocarbon oils, by treating them as hereinbefore described." This is the meaning which would first suggest itself to the mind. If the product is meant, the words "by treating them substantially as hereinbefore described" are useless. They are not only useless, but embarrassing; for, by the well-settled rules of construing all instruments, some importance must be attached to them; and, if they are to be regarded at all, they must either refer to the process of making the oils for which the applicant is claiming a patent, or they are intended to limit his claim for a patent for the product to that product only, when produced by treating the oils in the manner before described.

The counsel for appellant disclaim this latter construction, and allege that the patent covers the oil described, by whatever mode it may be produced. It is necessary to insist on this view, because it is made to appear in the case that the oils sold by defendants were produced by a process very different from that described by appellant.

We can see no reason why the applicant for the patent, if he had in his mind a claim for the article produced, should have intended so to limit his claim. If the article was the discovery which he sought the exclusive right to make, use, and sell, he was entitled to that monopoly, however produced.

If, however, he had in his own mind only a claim for the process of manufacture by which the article was made, then his reference to the mode of treating the oils from which it came was evidently proper and intelligible.

But the language in the specifications aids us in construing the claim. In the sentence next preceding this claim, he says: "It will also be evident to those skilled in the art that my

invention will be used, if the above-mentioned process be worked, to produce the deodorized heavy oils above described from distilled hydrocarbon oils," &c. It is very clear that what he here calls his invention is a thing which produces the deodorized oils, and not the oil itself. So again he says: "From the above it will be obvious that my invention consists in producing heavy hydrocarbon oils, suitable for lubricating and other purposes, and free from the characteristic odor, by distilling from them the volatile matter from which objectionable odors arise." Again he says: "In carrying on my new manufacture of deodorizing heavy oils with this apparatus, I place the oil to be deodorized in the still, and heat it by the fire beneath to the required temperature to commence the operation, the steam being shut off from the coil, and the outlet cock being opened to admit of the expulsion of any water from within the coil." Here the word "manufacture" is used in the sense of the word "process," — a word which could be substituted for it, without a shade of change in the meaning. As it can here mean nothing else but process, we have a definition of the meaning to be attached to it in other parts of the same paper, if that meaning were otherwise doubtful.

But, apart from these verbal criticisms, — all of which are just, and tend strongly to show what was the invention claimed by appellant, — it is impossible to read the four printed pages of specifications, in which appellant minutely describes his invention, without observing that they are almost wholly directed to the apparatus, the mode of using it, and the peculiar process of distillation, by which the more volatile parts of the heavy oils, which contain the offensive odors, are separated from the main body of the oil, pass over in that process, and leave the remainder free from this great drawback in its use in the arts. Why should this be so, if the applicant for the patent was only looking to the products as his invention, — the deodorized heavy hydrocarbon oils? If the oil alone was to be patented, by whatever process made, this elaborate description of one particular process was unnecessary.

A strong appeal is made by counsel to give the appellant the benefit of a liberal construction in support of the patent. Cases are cited in which this court has held that, rather than

defeat a patent where it appears that a valuable invention has really been made, this court, giving full effect to all that is found in the application on which the Patent Office acted, will uphold that which was really invented, and which comes within any fair interpretation of the patentee's assertion of claim.

We are not disposed to depart from this rule in the present case. There is no question here but that the patent is good for the second claim, — for the superheating coil, with its steam-pipe, &c.; and we are all of opinion that it is good for the process of distillation described in the specifications, by which the heavy hydrocarbon oils are deodorized. It is, therefore, a valid patent for two important matters, well set forth and described. If the patentee is also entitled to a patent for the product of this distillation, and has failed, as we think he has, to obtain it, the law affords him a remedy, by a surrender and reissue. When this is done, the world will have fair notice of what he claims, of what his patent covers, and must govern themselves accordingly.

The growth of the patent system in the last quarter of a century in this country has reached a stage in its progress where the variety and magnitude of the interests involved require accuracy, precision, and care in the preparation of all the papers on which the patent is founded. It is no longer a scarcely recognized principle, struggling for a foothold, but it is an organized system, with well-settled rules, supporting itself at once by its utility, and by the wealth which it creates and commands. The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights. The genius of the inventor, constantly making improvements in existing patents, — a process which gives to the patent system its greatest value, — should not be restrained by vague and indefinite descriptions of claims in existing patents from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand,

and correctly describe, just what he has invented, and for what he claims a patent.

In consistency with these views, we are of opinion that the appellant in this case has described and claimed a patent for the process of deodorizing the heavy hydrocarbon oils, and that he has not claimed as his invention the product of that process.

Decree affirmed.

MR. JUSTICE CLIFFORD dissenting.

I dissent from the opinion and judgment in this case, upon the ground that the invention, when the claim is properly construed, is an invention of the described new manufacture, and not, as decided by a majority of the court, merely for the process.

RELIEF FIRE INSURANCE COMPANY OF NEW YORK v. SHAW.

1. Unless prohibited by statute or other positive regulation, a valid contract of insurance can be made by parol.
2. There is nothing in the charter of the plaintiff in error, nor in c. 196, sect. 1, of the acts of Massachusetts for 1864, which prohibits it from entering into such a contract in that State.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Mr. J. G. Abbott for the plaintiff in error.

Mr. E. F. Hodges, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The principal question in this case is, whether a parol contract of insurance, made on behalf of the plaintiff in error by its agent in the city of Boston, was valid.

That a contract of insurance can be made by parol, unless prohibited by statute, or other positive regulation, has been too often decided to leave it an open question. That it is not usually made in this way is no evidence that it cannot be so made. To avoid misunderstandings in a contract of such importance and complexity, it is undoubtedly desirable that it should always be in writing; and such is the requirement of many codes of commercial law. But the very existence of the

requirement shows that it was deemed necessary to make it. The question came before the Supreme Judicial Court of Massachusetts in 1860, on a contract made under circumstances very nearly similar to those of the present case; and it was adjudged that a parol contract of insurance can be made. *Sanborn* v. *Firemen's Insurance Co.*, 16 Gray, 448. The court in that case says: —

"No principle of the common law seems to require that this contract, any more than other simple contracts made by competent parties upon a sufficient consideration, should be evidenced by a writing. No statute of Massachusetts contains such a requirement. Upon principle, therefore, we can find no authority in courts to refuse to enforce an agreement which the parties have made, if sufficiently proved by oral testimony."

This decision being directly in point, and being made by the highest court of the State where the present contract was made, is entitled to the highest consideration. The Court of Appeals of New York held the same doctrine in 1859, in the case of *The Trustees of the First Baptist Church* v. *Brooklyn Fire Insurance Co.*, 19 N. Y. 305. Judge Comstock, delivering the opinion of the court, after briefly and accurately stating the history of policies of insurance, in regard to this point, says: —

"The contract, as I have said, had its origin in mercantile law and usage. It has, however, become so thoroughly incorporated into our municipal system, that a distinction which denies the power and capacity of entering into agreements in the nature of insurances, except in particular modes and forms, rests upon no foundation. The common law, with certain exceptions, having regard to age, mental soundness, &c., concedes to every person the general capacity of entering into contracts. This capacity relates to all subjects alike, concerning which contracts may be lawfully made, and it exists under no restraints in the mode of contracting, except those which are imposed by legislative authority. There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law." See also May on Insurance, sects. 14–23, and *Kelly* v. *Commonwealth Insurance Co.*, 10 Bosw. 82.

We have been referred to the case of *Cockerill* v. *Insurance Company*, 16 Ohio, 148, in which it is held that a parol contract of insurance is not recognized as valid by the commercial law, but must be expressed in a written policy. We have also been referred to Duer on Insurance, p. 60, and to Millar on Insurance, p. 80, which are to the same purport as the Ohio case. On examination of the books on maritime law, on which these authorities rely, we find that the requirement of a written policy, though almost if not quite universal in maritime codes, is always by positive regulation; and we find those regulations as far back as the subject of insurance is discussed or legislated upon. But whilst this is true, the considerations referred to by Judge Comstock, in the New York case last cited, are unanswerable. And the numerous cases in which a parol contract for a policy of insurance has been sustained are conclusive that there is nothing in the nature of the subject which renders it insusceptible of a parol agreement. And whilst a statutory regulation requiring a writing may be very expedient, in the absence of such a statute it cannot be held that a parol insurance is void.

It is contended, however, that the present case is subject to, and is to be governed by, certain express relations, which take it out of the general rule of the common law. The charter of the defendant company is referred to as restraining its power to enter into contracts of insurance in any other manner than by a written instrument. The company was formed in 1856, under the General Fire Insurance Companies Act of New York, passed in 1853, by which any association proposing to be organized under its provisions was required to file a copy of its charter in the office of the comptroller, and therein "set forth the name of the company, the place where its business should be located, the mode and manner in which the corporate powers granted by the act are to be exercised, &c." The company in this case filed such a charter, by the first article of which it was declared as follows:—

"The name of this company shall be the Relief Fire Insurance Company. The principal office for the transaction of its business shall be in the city of New York. Its purpose and business shall be by instrument, under seal or otherwise, to make insurance on

dwelling-houses, stores, and all other kinds of buildings, and upon household furniture and other property, against loss or damage by fire," &c.

By art. 5 it is declared that "the president or other officer appointed by the board of directors, for the purposes aforesaid, shall be authorized, in the name and behalf of the company, and in and by policy of insurance in writing to be signed by the president or other officer and secretary of the company, to make contracts of insurance with any person or persons, or body politic or corporate, against loss or damage by fire," &c. It is insisted that these articles are the company's law of existence, and that it would be *ultra vires* for it to make parol contracts of insurance. But it is manifest that the article last quoted is merely affirmative as to what may be done by the officers in the usual course, and contains no negative clause that an insurance made otherwise than by a written policy shall be void. And the clause in the first article, which declares that the company's "purpose and business shall be by instrument, under seal or otherwise, to make insurance," admits of a wider construction than that contended for. The words, "by instrument, under seal or otherwise," may as well mean "by sealed instrument or otherwise," as to mean "by instrument, either under seal or otherwise." The substantial power given by law to an association organized under it, is to make insurance against loss and damage by fire. The mode and form in which it shall make its contracts is not prescribed as an essential part of its being or mode of action. The expressions referred to are not of that character. They indicate, in language chosen by the company itself, and not by the legislature, the ordinary mode of conducting its business. After having, by its officers and agents, made a parol contract of insurance, and induced the insured party, acting in good faith, to rely on its engagements, it cannot be permitted to shelter itself behind any such ambiguous expressions in its charter, and claim to have a special statute of frauds for its own benefit. Substantially similar provisions to those now relied on were contained in the charter of the Firemen's Insurance Company in the case of Sanborn; but the court held that they were merely enabling in their charac-

ter, and not restrictive of the general power to effect contracts in any lawful and convenient mode. "We cannot think," said Judge Hoar, delivering the opinion of the court, "that a provision in the charter of an insurance company, authorizing contracts authenticated by the signature of a particular officer, and without any words of restriction, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words, not restraining the power which they confer to make contracts, of which the policies are the evidence." 16 Gray, 454.

Substantially the same views were expressed by the Court of Appeals of New York, in the case of *First Baptist Church* v. *Brooklyn Fire Insurance Co.*, 19 N. Y. 309–311.

But, besides all this, it is not perceived how the insured can be affected by these verbal minutiæ in the charter of the company, without their being brought to his knowledge. The charter is a document on file in the office of the comptroller of New York, in the city of Albany. A person dealing with the company, in Massachusetts cannot be expected to know its precise terms. It holds itself out to be an insurance company, authorized to take risks against losses by fire, and by its officers and agents assumes to act in the same manner as other insurance companies do. However it may expose itself to be questioned by the government which created it, for exceeding the precise limits of the powers granted, it is estopped from eluding its obligations, incurred towards those who, in ignorance of these limits, contract with it in good faith, and upon the basis of the powers assumed by its recognized agents to exist.

It is contended, however, that there is a statute of Massachusetts which, in effect, requires that all contracts of insurance shall be in writing; namely, c. 196, sect. 1, of the acts of Massachusetts for 1864, which provides as follows: —

"In all insurance against loss by fire hereafter made by companies chartered or doing business in this Commonwealth, the conditions of insurance shall be stated in the body of the policy; and neither the application of the insured nor the by-laws of the com-

pany shall be considered as a warranty, or a part of the contract, except so far as they are incorporated in full into the policy, and appear on its face before the signatures of its officers."

It is evident that the object of this statute was, not to prohibit parol contracts of insurance, but to prohibit the practice of referring to a set of conditions not contained and set out in the policy, but embodied in some other paper or document. The statute was passed for the benefit of the insured, in order that they might not be entrapped by conditions to which their attention might never be called, and which they might inadvertently overlook and disregard, if they were not embraced in their policies. It applies in terms only to policies, that is, to written contracts of insurance; and has no application whatever to parol insurances. It does not prohibit them, nor affect them in any way.

Other points were taken by the plaintiff in error, to the effect that there was no evidence that the agent ever had authority to make other than a written contract, or that a completed oral contract was ever made as stated in the declaration, or that the insurance company ever authorized its agent to delegate to another the power to make insurance. An examination of the bill of exceptions shows that it does not contain all the evidence which was adduced. Whether the omitted portions would furnish any light on these points, we are unable to say. But we think that the evidence which is spread upon the record was sufficient to go to the jury, and we see no error in the charge of the court in this behalf. The agent who acted in this case had been accredited as the general agent of the company in the Commonwealth of Massachusetts from the beginning of 1870, and had, during all that time, been transacting the business of the company as such agent in the city of Boston. His mode of doing business was not materially different from that of other agents or companies. He had, during all that period, been assisted by a clerk or clerks, who attended to the business in his absence, — which the company must have known. These and other facts, sufficiently shown by the evidence, entirely justify the charge of the court, and the finding of the jury is conclusive.

We see no error in the record. *Judgment affirmed.*

SEITZ v. MITCHELL.

1. The rule of equity practice, that when a defendant's answer under oath expressly negatives the allegations of the bill, and the testimony of one person only affirms them, the court will not decree in favor of the complainant, does not extend to so much of the answer as is not directly responsive to the bill.
2. Purchases of real or personal property, made during coverture, by the wife of an insolvent debtor, are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof.
3. The earnings of the wife while cohabiting with her husband are not, by the Revised Statutes relating to the District of Columbia, made her separate property. She can have them only by his gift, and it is not protected against his creditors.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. A. G. Riddle and *Mr. Francis Miller* for the appellant.

Mr. R. Ross Perry, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The complainant in the court below sought to subject two pieces of real property in the city of Washington to the payment of several judgments recovered by the firm, of which he is the surviving partner, against George Seitz, one of the defendants. His bill alleges the recovery of those judgments, one on the ninth day of June and the other on the fourteenth day of December, 1868, the issue of executions thereon, and returns of *nulla bona* made by the marshal. It alleges further, that George Seitz, on the thirteenth day of January, 1870, purchased from one Kendall lot No. 61 in square 448, in the city of Washington; and, knowing of the judgments obtained against him, conspired with his wife, Mary E. Seitz, the other defendant, to delay and hinder the judgment creditor, by procuring the deed from Kendall to be made to the wife. The bill then charges that the deed was so made; that the purchase-money for the lot was paid by George Seitz with money earned by himself, to which his wife had no title whatever; and that a deed of trust was given to Kendall to secure a balance of unpaid purchase-money, which deed was

subsequently released to George Seitz and Mary E. Seitz. The entire purchase-money was $6,500.

The bill sets forth that the other lot, part of lot No. 1 in square 343, was purchased on the eighteenth day of October, 1872, by George Seitz, from one William F. Mattingly, for the sum of $6,000, and that it was also conveyed to Mary E. Seitz. The purchase-money was paid, it is alleged, with money borrowed from the Arlington Fire Insurance Company, and secured by deed of trust of both properties, which money, the bill charges, George Seitz, and not Mary E. Seitz, is bound to pay.

This second conveyance is also averred to have been made to the wife, with intent to hinder, delay, and defraud the husband's creditors; and the prayer of the complainant is that both lots may be subjected to the lien of the complainant's judgments, and that a trustee may be appointed to sell the property for the satisfaction of said liens out of the proceeds of the sale, after paying all expenses thereof, and all prior liens.

Such is the case made by the bill. No discovery is asked and no interrogatories are propounded.

The answer admits the recovery of the judgments as charged, but denies that George Seitz purchased the property or paid for the same, or owned or advanced any money to pay for the same, and denies also all fraud. It avers, on the contrary, that Mary E. Seitz, in her own right, and in her own name, and for her sole and separate property, purchased the Kendall lot, and took the deed in her own name; that she paid the purchase-money, to wit, $1,000 in hand and the balance on deferred time, all out of her own means and money earned and procured wholly by herself, and not from the said George, nor by or through him or his exertions; and that he signed the notes for the deferred payments and joined in the deed of trust at the request of the vendor, and not because he had any interest in the transaction.

The answer further states that the property bought from Mattingly was purchased by the wife for herself in her own name and in her own right; that she negotiated the loan with the Arlington Fire Insurance Company; that the whole transaction was hers, and not that of her husband; that he had

nothing to do with it except as her agent, or to express his assent for the satisfaction of other parties. To this answer a general replication was put in, and evidence has been taken on behalf of the complainant. The defendants have rested on their answer alone.

The general rule of equity practice is, that when a defendant has, by his answer under oath, expressly negatived the allegations of the bill, and the testimony of one person only has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath. In such cases there must be two witnesses, or one with corroborating circumstances, to overbear the defendant's sworn answer. The reason for this is, that the complainant generally calls upon the defendant to answer on oath; and he is, therefore, bound to admit the answer, so far as he has called for it, to be *prima facie* true, and as worthy of credit as the testimony of any other witness. This rule, however, does not extend to averments in the answer not directly responsive to the allegations of the bill, for the complainant has not called for them. It is always to be considered, therefore, when the rule is attempted to be applied, how far the averments of the answer are responsive to what is alleged in the bill. In the case before us, the defendants' answer denies that George Seitz purchased the Kendall lot, or paid for the same, or owned or advanced any money to pay for the same. So far it is responsive to the complainant's allegations. But the answer furnishes no evidence that the wife had any separate property, or any means or money of her own with which to pay the purchase-money of the lot conveyed to her. Nor do the proofs taken exhibit any such evidence. George Seitz and Mary his wife lived together. He carried on a bakery, and she attended to the duties of the house. There were four or five boarders in the house, paying monthly from $20 to $30 each. There is nothing to show that the wife had any opportunity for obtaining money except from her husband. Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such

purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action. Authorities to this effect are very numerous. In *Gamber* v. *Gamber*, 18 Penn. St. 306, a case where a wife claimed personal property against the insolvent estate of her deceased husband, it was said by the court: "In the case of a purchase after marriage, the burden is upon the wife to prove distinctly that she paid for it [viz., the property purchased by her] with funds which were not furnished by the husband." In *Keeny* v. *Good*, 21 id. 349, where the contest was between a wife and her husband's creditors, it was ruled that mere evidence that she purchased the property during the coverture is not sufficient to give her title; that it must satisfactorily be shown that the property was paid for with her own separate funds, and that, in the absence of such evidence, the presumption is a violent one, that the husband furnished the means of payment; and it was held that this rule applies to real as well as to personal estate. So in *Walker* v. *Reamey*, 36 id. 410, a contest respecting real estate, where the purchase was made by a wife in her name, and where the money paid upon the contract, so far as payment was shown, was paid by her, it was held that a married woman, claiming, in opposition to her husband's creditors, property purchased after marriage, must show that she had received money "by will or descent, conveyance or otherwise, and had invested it in the property claimed." It was also said not to be enough that she was seen in the frequent possession of money after the passage of the married-woman's act of the State, for in such case the presumption is that it was the husband's money. So in *Parvin* v. *Capewell*, 9 Wright, 89, it was decided that the mere possession of

money by a wife is no evidence of her title in an action by a creditor of the husband, and when there is no evidence save possession, the jury should be instructed to find for the creditor. *Vide* also *Bradford's Appeal*, 5 Casey, 513, and *Aurand* v. *Shaeffer*, 7 Wright, 368. So property purchased by a married woman on credit, or with her earnings, has been held to be subject to the levy of an execution against her husband. *Robinson* v. *Wallace*, 8 id. 129. All these decisions were made after the enactment of a statute giving to married women rights of property as against the husband and his creditors, at least as broad as any which exist in the District of Columbia. And similar decisions have been made in other States where like statutes have been enacted. *Switzer* v. *Valentine*, 4 Duer (N. Y.), 96; *Glann* v. *Younglove*, 27 Barb. (N. Y.) 480; *Woodbeck* v. *Havens*, 42 id. 66; *Rider* v. *Hulse*, 24 N. Y. 372; *Connors* v. *Connors*, 4 Wis. 131; *Elliott* v. *Bentley*, 17 id. 610; *Edson* v. *Hayden*, 20 id. 682; *Duncan* v. *Roselle*, 15 Iowa, 501; *Cramer* v. *Redford*, 17 N. J. Eq. 367. Many of these cases relate to the ownership of the wife's earnings; and nowhere, so far as we are informed, has it been adjudged that her earnings or the product of them, made while she is living with her husband and engaged in no separate business, are not the property of the husband when the rights of his creditors have been asserted against them. Certainly the acts of Congress respecting the rights of married women in this District do not assure such property to the wife. Sect. 727 of the Revised Statutes relating to the District of Columbia is as follows: —

"In the District, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

Sect. 729 gives a married woman power to contract, to sue and be sued in her own name in all matters having relation to her sole and separate property. No other power to contract is given to her. Her earnings while cohabiting with her husband are not made her property. She can have them only by the

gift of her husband, and such a gift is not protected against his creditors.

Applying the principles settled by the authorities we have cited to the pleadings and proofs in the present case, it is free from doubt. The answer does not aver that Mrs. Seitz paid for either of the lots conveyed to her out of her separate property. It does not aver that she had any separate property, nor does the proof show that she had any. The entire purchase-money of the lot obtained from Mattingly was paid with money borrowed from the Arlington Fire Insurance Company, for which George Seitz and his wife gave their notes, accompanied by a deed of trust of that lot, and of the one obtained from Kendall. For the payment of those notes, George Seitz is personally liable, and his wife is not. It is not averred or proved that she has paid out of her own means, or in any way, even one cent of that debt.

And in regard to lot No. 61, purchased from Mr. Kendall, the proof is that the negotiation for the purchase was commenced by the husband. He called upon the vendor, and obtained information of the price and of the terms. A month afterwards, the husband and wife went to the vendor's office, and the bargain was there consummated and the deed was given. One thousand dollars, part of the purchase-money, was paid by Mrs. Seitz in the presence of her husband; four promissory notes, each for $600, and one for $3,100, were given for the remainder. All these notes were signed by the husband and the wife; and a deed of the lot in trust, signed also by the husband and wife, was given to secure the payment of the notes. No evidence has been submitted to show that the first thousand dollars, the down money, was not the property of the husband; while the law presumes that it was, in the absence of proof to the contrary, beyond her having possession of the money. And it does not appear that Mrs. Seitz ever paid any portion of the notes given for the remaining purchase-money. They have all been paid, except a small balance of about $100; and the proof by two witnesses is, that the payments were principally, if not wholly, made by George Seitz himself. The allegation of her answer that she paid the purchase-money is, therefore, disproved. But, were it true, it would not avail her,

unless she paid it with her own separate property. She avers that she paid it with means and money earned and procured wholly by herself. Of that there is no proof, nor attempt to adduce proof; though, if the fact were so, the means of proving it must have been peculiarly within her knowledge and power, and we have already observed that money procured by her earnings belonged to her husband, and was not her separate property. To hold that conveyances thus taken and thus paid for are sufficient to protect the property against creditors of an insolvent husband would be making fraud both profitable and easy. *Decree affirmed*

MACLAY v. SANDS.

Under the Civil Practice Act of Montana, judgment cannot be entered against a defendant, as upon default for want of issues to be tried, where there is on file in the cause an answer specifically denying, upon information and belief only, all the allegations in the complaint, if it appears that the facts in controversy were not within the personal knowledge of the defendant, and that the information upon which he based his belief came from his agents employed to transact the business out of which the litigation arose.

ERROR to the Supreme Court of the Territory of Montana.

Mr. L. M. Saunders and *Mr. W. F. Saunders* for the plaintiff in error.

Mr. R. T. Merrick, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

This case presents the single question whether, under the civil practice act of Montana, judgment can be entered against a defendant, as upon default for want of issues to be tried, when there is on file in the cause an answer denying specifically all the allegations in the complaint, but in which the denial is based upon information and belief only, if it appears that the facts in controversy were not within the personal knowledge of the defendant, and that the information upon which he based his belief came from his agents employed to transact the business out of which the litigation arose.

Sects. 56 and 63 of the Practice Act are as follows: —

"SECT. 56. The answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant. . . . In denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state that, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a belief."

"SECT. 63. All complaints, answers, and replications shall be verified as provided in this section. . . . The affidavit of verification shall state that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true. Such verification shall be made by the party, or, if there are several parties united in interest or pleadings, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit."

The verification in this case was in the proper form, and it further stated, "that the defendants' said business at Corinne, Utah, was performed by agents, from whom affiant's information, upon which he based said belief, is derived." These facts are not controverted. The business of the defendants, in respect to which they were sued, was that of common carriers, and must necessarily have been conducted to a considerable extent through agents. Under such circumstances, their knowledge as to many of their transactions would properly come from information. If the facts had been such as must have been within their personal knowledge, a denial upon information and belief might perhaps have been properly treated as evasive; but here any presumption of personal knowledge has been overcome by the statements in the verification, and unless parties under such circumstances are permitted to qualify their denials, they will be compelled to swear positively to that which they only believe to be true because they have information to that effect.

We do not think that parties, upon a fair construction of the statute, are driven to that extremity. The denial, when made, must be specific; but it is none the less specific because

based on information and belief. Provision is made for an issue by a formal denial, where sufficient knowledge or information upon which to base a belief cannot be obtained. This implies that, if the necessary information can be obtained, a statement must be made predicated upon that; and, if it is to be made, we cannot see what harm can result from adding the grounds on which it is based. It is the same for all the purposes of an issue whether the qualification is given or not, and the issue is the material thing to be attained.

But sect. 63 seems to us to be conclusive upon the propriety of the practice. There provision is made for one form of verification if the statement is upon personal knowledge, and another if upon information and belief. Why this, if information and belief in a proper case were not sufficient to justify an averment? But unless the pleading shows that the statement is founded upon information, &c., the form of the oath prescribed would be of no avail, because that contemplates a positive verification in all cases where it does not appear in the body of the pleading that a qualification is intended. In some States, the practice acts require a verification only to the effect that the party believes his statements to be true. In such cases there is no necessity for qualifying the averments in the pleading, because the oath prescribed establishes all the limitation that is necessary. In Montana, however, the qualification must be made in the pleading.

This view of the practice is sustained in *Hackett* v. *Richards*, 8 E. D. Smith, 13; *Sayre* v. *Cushing*, 7 Abb. Pr. 371, note; *Edwards* v. *Lent*, 8 How. Pr. 28. The cases of *Thorn & Maynard* v. *New York Central Mills*, 10 How. Pr. 19, and *Blake* v. *Eldred*, 18 id. 244, cited in opposition, involved only the question of what might be denied under the allegation of "want of sufficient knowledge or information to form a belief," and all that was said beyond that was not necessary to the decision.

We think, therefore, that the denial upon information and belief was sufficient to present an issue for trial, and that the court erred in deciding otherwise.

Cause remanded, with instructions to reverse the judgment of the District Court and to direct that court to proceed, in accordance with this opinion, as law and justice may require.

CLAPP v. MASON.

A., who died Dec. 4, 1867, devised his real estate to his widow for her life, with remainder over to B. She died June 17, 1872, when B. entered. *Held*, that an internal revenue tax could not be legally assessed May 15, 1873, on B.'s succession.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the plaintiff in error.

Mr. George Putnam, Jr., contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiffs below brought their action against the collector of internal revenue to recover back a tax paid to him to avoid distraint. The facts are these: —

William P. Mason, the plaintiff's testator, died Dec. 4, 1867. By his will, the real estate upon which the tax in question was levied was devised to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death, or ceasing so to occupy the same, to the plaintiff.

The widow occupied the said real estate as her residence until her death, June 17, 1872.

The tax in question was assessed on the 15th of May, 1873, by the assessor of said district, and on the 31st of May, 1873, the plaintiff paid the defendant the said tax under protest, to avoid distraint or other forcible process to collect the same.

The Circuit Court held that the tax was illegally imposed, and gave judgment that the party paying it should recover back the amount with interest. The collector appeals.

The relationship, if any, between the deceased and the devisees does not appear. The identity of names is suggestive upon the point, but no facts in relation to it are contained in the record.

It is conceded that under the United States statute of 1864 the tax would have been a proper one. The statute of July 14, 1870, repealed the taxes imposed by the act of 1864 on legacies

and successions after the first day of August, 1870. 16 Stat. 261, sect. 17.

The Repealing Act contained the following proviso: —

"And all acts and parts of acts relating to the taxes herein repealed, and [that] all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof; and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such act is hereby saved."

The collector insists that the tax upon the succession in question had accrued before the repeal of the act of 1864; to wit, that it accrued upon the death of the testator in 1867. The devisees contend that the tax did not accrue until they came into the possession of the land, and that before this occurred the statute authorizing the tax was repealed. The question is, when did the right to this tax accrue, — at the death of the testator, or at the death of the widow, when the plaintiff became entitled to the possession of the land?

By the statute of 1864, as a part of a system of taxation made necessary by the existence of a civil war, a tax was imposed upon the "succession to real estate." 13 Stat. 287. The term "real estate" was defined to include all lands, tenements, and hereditaments, corporeal and incorporeal; and a "succession" was declared to denote "the devolution of title to any real estate." Sect. 126.

By sect. 127 it is provided that any disposition by will, or deed, or descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or any interest therein upon the death of any person, shall be deemed to confer a succession. The argument made upon this section by the plaintiff in error, that the will of Mason conveyed an estate to William P. Mason and Charles H. Parker, and that, although they were not entitled to immediate possession, they had a vested estate, and that the succession to such an estate was made taxable, we readily admit. We agree,

further, that vested estates not only, but estates which are not vested, — those in expectancy merely, — are within the statute. *Wimple* v. *Forda*, 2 Johns. (N. Y.) Ch. 288. The admission, however, does not aid us in deciding the point before us, as the question of time still arises, — when is this vested estate taxable?

Sect. 133 enacts that the duties there provided for shall be as follows, viz.: Where the successor is a lineal descendant or a lineal ancestor, at the rate of one per cent upon the value; where the successor is a brother or sister, or a descendant of a brother or sister, at the rate of two per cent upon the value; . . . where the successor shall be a stranger in blood to the testator, at the rate of six per cent upon the value.

The next section provides, that if by reason of death the succession shall pass to another person before the first taker shall have become entitled to the possession, then one duty only shall be paid; and such duty shall be due from the successor first entitled to possession, and shall be at the highest rate which either successor would have been liable to pay.

Thus, in the case before us, if we may suppose that the testator devised his real estate to his wife during her life or her occupancy, and after her death or ceasing to occupy to his son William P. Mason, and to his nephew Charles Henry Parker, jointly, and in another contingency to one who bore no relationship to him, the rate of duty chargeable upon succession by the first-named person, if he stood alone, would be that of one per cent, and upon the succession of Parker, that of two per cent, upon the value. If before becoming entitled to the possession of the estate by either of the contingencies mentioned, the estate should pass to the stranger in blood to the testator, the succession would be chargeable with a duty at the rate of six per cent upon its value.

The statute contemplates the payment of one succession duty only upon the death of an owner of real estate, and it contemplates the exaction of the highest of the rates prescribed, which has become payable upon the principles stated, before the successor is entitled to enter into the enjoyment of the estate. It would be difficult to carry out this system in any other manner than by the provision that the succession should not be deemed

taxable until such time as the successor should be entitled to its possession.

We find, therefore, as perfecting the plan, that sect. 137 prescribes that period as the time when the duty is to be paid.

"SECT. 137. And be it further enacted, that the duty imposed by this act shall be paid at the time when the successor, or any person in his right or his behalf, shall become entitled in possession to his succession, or to the receipt of the income or profits thereof."

The act of 1864 contains no statement or intimation that this duty creates any lien upon the land, or that any obligation arises, or that any right accrues at a period earlier than that fixed for the payment of the duty. See sects. 133, 137.

By the statute of 1866 the duty becomes a lien on the succession "from the time when such tax shall become due and payable." 14 Stat. p. 140. By the same statute an assessment is to be made within thirty days from the time the party becomes entitled to the possession of the estate. Id. 140, 141.

It is manifest that the right does not accrue until the duty can be demanded, that is, when it is made payable; in other words, at the end of thirty days after becoming entitled to possession.

The provision of a subsequent section (sect. 144) in relation to estates in expectancy, that is, where the estate of the successor is not a vested one, is upon the same theory. In that case the commissioner of internal revenue is authorized to commute the duty presumptively payable for a sum certain to be presently paid, ascertaining the present value of such presumptive duty upon principles laid down. It is not certainly known in either class of cases who will be the party liable to pay the duty, upon what value it shall be paid, nor what will be its rate, until the arrival of the time of enjoyment.

In the case we are considering, the successor did not become entitled to the possession or enjoyment of the estate until the death of the widow, which occurred on the seventeenth day of June, 1872. The duty imposed extended only to successions accruing prior to Aug. 1, 1870. The saving clause, therefore, does not reach the case.

May v. *Slack*, 16 Int. Rev. Rec. 134, is cited, but it has no bearing upon the question.

We are satisfied that the statute was correctly construed by the Circuit Court. *Judgment affirmed*

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. SCHWENK.

1. Where it is not a condition of a policy of life insurance that a statement of the age of the insured should accompany the proofs of his death, the party for whose benefit the insurance was effected, although no previous notice was given to the insurers that such evidence would be offered, is not estopped from proving at the trial of a suit on the policy that a statement of the age of the deceased accompanying such proofs, and differing from that made in the application, is erroneous.
2. An entry in the minute-book of a lodge of odd fellows, of which the deceased was a member, made prior to the issue of the policy, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, is not admissible as evidence of such age. It is merely hearsay.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This action was upon a life policy, dated March 26, 1867, procured by Anthony A. McDonough from the Connecticut Mutual Life Insurance Company, in the name and for the sole use and benefit of his wife, Mary D. McDonough. In case she died before him, the amount of the insurance was payable to her children, for their use, or, if they were under age, to their guardians, ninety days after notice and proof of his death. He died on the twelfth day of April, 1869, and she on the sixteenth day of April, 1868, leaving two children by him, and two by a former husband, who, by their guardians, brought this suit.

The application for insurance was signed by Mary D. McDonough and Anthony A. McDonough, at Reading, March 25, 1867. To the question, "Place and date of birth of person whose life is proposed to be insured, — giving month and day?" the following answer was given: "Ireland, Aug. 11, 1805." "Age next birthday?" "Sixty-two."

The declaration contains the common counts in assumpsit,

setting forth the policy, the application, interrogatories, and answers The defendant filed fifteen pleas. The first two put in issue the execution of the policy and alleged performance; the third, that the said Anthony A. McDonough was not born in the year 1805. The remaining pleas set up misrepresentations and false allegations in the application as to the health and habits of the insured. The pleas were traversed by replications.

At the trial, the plaintiffs put in evidence the policy, proofs of death, and, by request of defendant's counsel, the application for insurance, and then called Adam Schwenk, who swore that, within sixty days after the death of said Anthony, he gave all the proofs of it to Tilden, the agent of the company, who did not object to any matter of form.

The defendant having asked for a nonsuit on the ground that the affidavit of one Nolan, furnished with the proofs of death, showed that the deceased was between sixty-six and seventy years of age at the time of his death, the court, notwithstanding the objection of the defendant, that it had not prior to the trial received notice that such evidence would be offered, permitted the plaintiffs to call Nolan as a witness. He testified, in substance, that he had no positive knowledge of the age of the deceased, but that the age fixed by him in his affidavit was a mere impression, founded upon the appearance of the deceased. To the admission of this evidence the defendant excepted.

In the course of the trial, the defendant, in order to prove that the age of the deceased was different from that stated in his application, offered in evidence a certain entry or statement, dated Sept. 6, 1845, contained in the minute-book of Bernville Lodge of Odd Fellows, of which deceased was a member, and at one time secretary. The court refused to admit the evidence, and the defendant duly excepted. The jury found all the issues in favor of the plaintiffs, and, a judgment having been rendered in their favor, the defendant sued out this writ of error.

Mr. Michael Arnold for the plaintiff in error.

The court declined hearing counsel for the defendants in error.

MR. JUSTICE STRONG delivered the opinion of the court.

The issue, out of which arose both the questions brought here by this case for determination, was founded on a plea that Dr. McDonough, the person whose life had been insured, was older than he had been represented to be in the application for the policy. In that application, made March 25, 1867, his age was stated to be sixty-two at his next birthday. Accompanying the proofs of death furnished to the company by the plaintiffs below was an affidavit of one Thomas Nolan, that the death occurred on the 12th of April, 1869, and that the deceased was between sixty-six and seventy years of age at that time, according to the best judgment of the affiant. To explain the discrepancy between the statement of the affidavit and that made in the application, the plaintiffs offered to prove that the age of the deceased was different from that stated in the affidavit; and, for this purpose, they offered to prove by Nolan himself that he was mistaken, and that he had no knowledge upon the subject. This evidence the court received, notwithstanding an objection by the defendants (the ground of the objection being that no notice had been given to them prior to the trial that such evidence would be offered); and the admission of the evidence is the first error assigned.

In considering the ruling of the court, it is first to be observed that nothing in the policy required that proof of the death of the person whose life was insured should be accompanied by proof of his age at the time of his death. There was, it is true, a memorandum, indorsed on and folded in the policy, that a certificate would be required from some intimate friend of the age of the person insured at the time of his death; but the memorandum was no part of the contract, and it was not shown to either the court, the jury, or the counsel, before the verdict was rendered. Nolan's affidavit, therefore, was no necessary part of the proofs of death, and hence it was immaterial. Yet, having been furnished by the plaintiffs to the defendant, it was some evidence of the age of the person insured, though certainly not conclusive. There can be no reason why it was not open to correction, if it was erroneous. This is not denied by the plaintiff in error, and it could not be successfully. It has repeatedly been held that errors and omissions in the proofs of loss fur-

nished to insurers, in cases of fire insurance, may be corrected or supplied at the trial. In *McMasters* v. *The Insurance Company of North America*, 55 N. Y. 222, the plaintiff had stated in his proofs of loss that he had other insurance on the same property, — a fact which, if true, avoided his policy, — and he had verified his statement by his oath. Yet he was held not to be estopped by the statement, and he was permitted to prove at the trial that the statement was a mistake. *Hubbard* v. *The Hartford Fire Insurance Co.*, 33 Iowa, 325, is to the same effect. So are the *Ætna Fire Insurance Co.* v. *Allen*, 48 Ill. 431, *Comm. Fire Insurance Co.* v. *Huckenburger*, 52 id. 464, and numerous other cases that might be cited. But it is contended that evidence to show Nolan's affidavit was a mistake ought not to have been admitted, without notice to the insurers before the trial that such evidence would be offered; and in support of this position *Campbell* v. *The Charter Oak Fire and Marine Insurance Co.*, 10 Allen (Mass.), 213, and *Irving* v. *The Excelsior Insurance Co.*, 1 Bosw. (N.Y.), 500, are cited. In the former of these cases, it was held that, if an incorrect statement of a material matter has been made through mistake in a notice and proof of loss furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake, and show that the facts were not as therein stated. But that case is very different from the one we have before us. There a true statement of the material fact in the proofs of loss was called for by the policy, and it was made a condition precedent to the insurer's liability. The erroneous statement, therefore, was relied upon by the assured, as the notice required by the conditions of the policy, and as a necessary basis of his suit. It must have been, in substance, averred in his declaration; and, for these reasons, the insurers were misled in regard to a matter which the assured had obligated himself to state truly, as a condition precedent to his right to remuneration for his loss. But even in that case the court declined to say that the incorrect statement in the proofs of loss could not be corrected. All that was decided was that the

mistake and the correction could not be first made known to the insurers at the trial of the action to recover for the loss, and obviously for the reason that the correction then would be a surprise to them. *Irving* v. *The Excelsior Fire Insurance Company* is substantially the same. Neither of the cases can be considered as deciding that an insured is estopped by an erroneous statement of a fact in the proofs of loss furnished by him, even though a true statement of that fact be a condition of the policy. He may correct it, though not first at the trial. But, in the case we have in hand, it was not a condition of the policy that a statement of the age of the deceased should accompany the proofs of death. The insurer's liability was independent of that. Nolan's affidavit, therefore, was superfluous; and it was but a statement of his conjecture. He stated that, according to the best of his judgment, the person whose life was insured was between sixty-six and seventy years of age at the time of his death. This can hardly be regarded as a contradiction of the statement made in the application. The insurers ought not to have been misled by it, and it does not appear that they were. They alleged no surprise when the evidence was offered to show that Nolan had no knowledge on the subject, and that he was mistaken. We cannot, therefore, say there was error in receiving the evidence.

The second assignment is, that the court erred in rejecting the minute-book of a lodge of odd fellows, offered by the plaintiffs in error to show the age of Dr. McDonough, as recorded therein in the usual manner of keeping the records of the lodge. It might, perhaps, be enough to say of this, nothing in the bill of exceptions shows that the minute-book, had it been received, would have tended to prove the age was greater than it was stated to be in the application for the policy. But, waiving this, and conceding also, that, when a policy on the life of a husband has been issued for the benefit of a wife, his admissions made prior to its issue are admissible in evidence to contradict her statements in her application, we are of opinion that none of the entries in the minute-book can be regarded as admissions of McDonough respecting his age. They were made by the secretary of the lodge before McDonough became a member of it, and they do not state that any represen-

tation of his age was made by him; much less, that he stated his age was as the secretary entered it. What was entered, then, was the declaration of a third party, not an admission by the person whose life was insured: it was mere hearsay, at best. It nowhere appears McDonough knew of the entry, or assented to it, when it was made, or that he ever afterwards acquiesced in it. True, he was subsequently elected secretary of the lodge, and then had the book of minutes in his charge. He may then have read the minutes, and thus have obtained notice that such an entry appeared therein. But it would be going very far to hold such knowledge was any evidence of an admission by him that the statement of his age made in the entry was true.

It is argued, however, that though the entry in the minute-book was the declaration of a third person, it was admissible on the principle of necessity; and we are referred to the line of decisions in which it is said to have been ruled that written entries or declarations of third persons are admissible as primary evidence after their decease, when they accompany, or are explanatory of, some material fact, or as secondary evidence, when the particular circumstances afforded reasonable assurance that the person who made them knew the fact stated, communicated it faithfully, and cannot be obtained to testify. Without pausing to inquire whether the doctrine asserted in these cases is as broad as the plaintiffs in error state it, the present case clearly fails to come within it. The secretary who made the entry in the lodge minute-book had, so far as it appears, no peculiar means of knowledge of Dr. McDonough's age, and there is no proof that he was not living at the trial. For aught that appears, he might have been called as a witness.

Again, it is argued that a man's age is one of the elements of his pedigree, and that, in proving pedigree, hearsay evidence is admitted. The argument is fallacious. It is true, the age of a person may become material in questions of pedigree; but even then the hearsay declaration of strangers, persons not related by blood or marriage, are inadmissible to prove it. Moreover, the present case involves no question of pedigree. The proof of age was not offered for the purpose of showing parentage or

descent, both of which were impertinent to the issue between the parties. The assignment of error cannot, therefore, be sustained. *Judgment affirmed.*

THE "STEPHEN MORGAN."

1. A party who does not appeal from the final decree of a circuit court cannot be heard in opposition thereto, when the case is properly brought here by the appeal of the adverse party.
2. This court, concurring in opinion with the court below that both vessels were at fault, affirms the decree dividing the damages between them.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The facts are stated in the opinion of the court.

Mr. F. W. Brune and *Mr. Arthur G. Brown* for the appellants.

Mr. I. Nevitt Steele and *Mr. Thomas W. Hall, contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree when the cause is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants. *The William Bagaley*, 5 Wall. 377; *Harrison* v. *Nixon*, 9 Pet. 494; *Canter* v. *Insurance Company*, 3 id. 318.

Where the decree was in favor of the libellant in the District Court for a salvage service in saving goods at sea, this court held, on appeal here by the owners of the goods, that the decree was conclusive upon the libellant as to the amount of salvage awarded; that he could not, in the appellate court, claim any thing beyond that amount, since he had not, by any appeal on his part, controverted its sufficiency. *Stratton* v. *Jarvis & Brown*, 8 id. 10.

Compensation is claimed by the owner of the steamship "Carolina" from the schooner "Stephen Morgan," her apparel, tackle, and furniture, for injuries caused to the steamship by

the schooner in a collision which occurred between the two vessels during the early morning of the 3d of October, 1872, in the lower part of Chesapeake Bay, whereby, as the appellant alleges, the steamer was damaged to the amount of from $12,000 to $15,000.

Detailed description of the circumstances is given in the libel, from which it appears that the steamer, a vessel of eleven hundred tons burden, with a cargo of corn, was bound down the bay on a voyage from the port of Baltimore to Queenstown, Ireland, for orders, and that the schooner, a vessel of two hundred and fifty-nine tons, in ballast, was bound up the bay on a voyage from the port of New York to the port of Georgetown, in this district. Both the steamer and the schooner were in a seaworthy condition, well manned and equipped, and the evidence shows that they had competent lookouts, and that their signal-lights were properly displayed.

Certain errors of statement are exhibited in the description of the circumstances attending the collision, as given in the libel; but inasmuch as it is apparent that they were not made with intent to deceive, and that they did not have the effect to embarrass the opposite party or the courts below, they cannot have the effect to prevent the libellant from recovering just compensation for the injuries which the steamer received, if the evidence is sufficient to show that the decree below is correct upon the merits.

Process was issued; and the owners of the schooner appeared as claimants, and filed an answer.

Matters of fact are the chief reliance of the respondents; and, inasmuch as the allegations of the answer show, in the judgment of the court, that the schooner was in fault, they will be given in considerable fulness.

Prior to the collision, the mate had charge of the deck of the schooner; and the respondents allege that the weather was fair, and that it was clear overhead, with a slight mist or haze on the water; that the wind, from about southwest-by-south, was blowing a fresh and steady breeze; that the schooner was on her port tack, with all her sails set, except her main top-sail and jib top-sail; that her speed was about seven or eight knots an hour; that the mate, about ten minutes after he took charge

of the deck, directed the man at the wheel to change the course of the schooner from north-by-west-half-west to north-by-west, which, as the respondents allege, was her proper course up the bay. Ten minutes later, as the respondents allege, the lookout saw a bright light ahead, about a point or a point and a half on the starboard bow of the schooner, and that the mate, who was standing aft to the leeward of the spanker-boom, saw the light about the same time, and looked at it through the glass. Though the morning was clear, the mate came to the conclusion that the vessel showing the light was at anchor, because he could only see the white light, and he thought the vessel was distant about a mile and a half, or two miles.

Estimates of the kind are necessarily more or less uncertain; but the answer states that the schooner was then a little above the light-house, and nearer to the western than the eastern shore of the bay; and the respondents admit that the schooner had plenty of room to sail and manœuvre on each side of the place where the vessel showing the light appeared to be at anchor. When the mate first looked at the light, he told the man at the wheel that it was a ship at anchor, and he directed the helmsman to let the schooner luff about a point; and that being done, the statement is, that the light was brought to bear about two points on the schooner's starboard bow. Both of those orders were promptly obeyed; and the answer states that the helmsman, after the order to luff was executed, steadied the schooner, and "let her run" for a short time; when the mate, thinking that the schooner might not fairly clear the ship, told the man at the wheel to luff a little more, so as to allow plenty of room.

Throughout those manœuvres, both the mate and the lookout of the schooner supposed that the light ahead was shown by a vessel at anchor; and they never discovered their mistake until the steamer approached so near that they could see her smoke-stack without the aid of the glass. Alarm and confusion immediately ensued on the deck of the schooner, as sufficiently appears from the allegations of the answer. Obviously the peril was imminent; and the answer states that the mate, fearing that a collision would occur, ordered the helmsman to put the wheel hard a-port; and that the master came on deck at

that moment, and asked the mate what was the matter; and being told that there was a light on the lee bow, the master looked under the boom, and, having seen the light, ordered the wheel to be put hard down, which was immediately done. Under the order given just before by the mate, the wheel had been turned only a few spokes to port, when the master gave the order to put the wheel hard down, which being promptly obeyed, the schooner began to luff; and at the moment of collision, which presently ensued, she was still coming into the wind, and her sails were shaking. Almost immediately after the helm of the schooner was put hard a-starboard the collision occurred, the schooner striking the steamer abaft the fore-rigging and a little forward of midships.

Testimony was taken on both sides; and the parties having been fully heard, the District Court decided that both vessels were in fault, and that the joint loss and damage should be equally divided between the owners of the two vessels. Pursuant to that decretal order, the loss and damage sustained by each were ascertained, and a final decree rendered in favor of the libellant, for the sum of $5,295, with costs and interest. Immediate appeal was taken by both parties to the Circuit Court, where additional testimony was taken; and the parties having been again fully heard, the Circuit Court reduced the damages to be awarded, and in all other respects affirmed the decree of the District Court. Due appeal to this court was taken by the respondents; but the libellant acquiesced in the decree of the Circuit Court.

Two errors, it is alleged by the appellants, were committed by the Circuit Court, as follows: 1st, That the court erred in awarding damages to the libellant, inasmuch as the allegations of the libel, if true, showed that the alleged collision could not have occurred. 2d, That the court erred in adjudging that the schooner was in fault.

Substantial accuracy in pleading should be observed by the libellant; and it is proper to remark, that a departure from that requirement, with intention to deceive, may constitute a bar to recovery, unless the faulty party is relieved from its consequences by leave of the court. Defects of the kind, when discovered, should be cured by amendment in all cases where the imperfection is calculated to deceive or mislead.

Incorrect allegations as to the position and course of the steamer are doubtless contained in the libel; but it does not appear that the inaccuracies were intended to deceive, or that they had the effect to mislead, the opposite party or the court. Specific objection to the libel on that account was not taken in the answer, nor does it appear that the errors in the allegations occasioned any embarrassment to the respondents in preparing the case for hearing.

Material errors undoubtedly occurred in the libel, but the respondents corrected the same in their answer; and, inasmuch as the hearing upon the merits was full in each of the courts below, the court here is not inclined to sustain that defence. *The Syracuse*, 12 Wall. 173.

Much discussion of the second defence is unnecessary, as both the proofs and the allegations of the answer show that the schooner violated the sailing rules enacted by Congress. Steamships, under the circumstances described, are required to keep out of the way of sailing-ships; but the correlative rule is, that the sailing-ship shall keep her course, subject to certain qualifications, which have no application in the cause before the court. 13 Stat. 61.

Sailing-vessels approaching a steamer are required to keep their course, on account of the correlative duty of the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and that she may not be baffled or led into error in her endeavor to comply with the requirement. *Steamship Company* v. *Rumball*, 21 How. 384.

Three changes of course were made by the schooner, in violation of that rule, which is all that need be remarked on the subject, except to say that the failure of the steamer to perform her duty to keep out of the way is no defence for the schooner in violating the express command of the sailing rule. Beyond all doubt, the steamer might have kept out of the way; and it is clear that the decree below, adjudging both vessels in fault, was correct. All that the steamer did in the outset was to change her course one point; and the evidence satisfies the court that, if she ever did any thing more to prevent a collision, it was not done in season to be of any avail. Porting the helm a point when the light of a sailing-vessel is first observed, and then

waiting until a collision is imminent before doing any thing further, does not satisfy the requirements of the law. *The Carrol*, 8 Wall. 302.

Other support to that conclusion might be invoked; but it is quite unnecessary, as the owner of the steamer did not appeal, and cannot be heard, except in defence of the decree. *Airey* v. *Morrill*, 2 Curt. C. C. 8; *Allen* v. *Hatch*, 2 id. 147; *Chittenden* v. *Brewster*, 2 Wall. 196; *The Quickstep*, 9 id. 672.

Both vessels having been in fault, the settled rule in this court is, that the damages must be divided. *The Atlas*, 93 U. S. 319.

Viewed in any light, it is clear that the decree below was correct, and that there is no error in the record.

Decree affirmed.

GLENNY v. LANGDON.

Where a party prosecutes a suit as a representative creditor, and the other creditors, until notice to the contrary, have the right to rely upon him to protect their interest in the subject-matter of the litigation, a notice by the appellees of a motion to dismiss an appeal where he is the appellant, served upon counsel representing him and the other creditors, is insufficient and irregular, if it does not specify the time when such motion will be made, although he may have entered into a stipulation with the appellees consenting to a dismissal of the appeal on their paying the costs.

MOTION to set aside an order dismissing an appeal from the Circuit Court of the United States for the Southern District of Ohio.

Mr. J. L. Miner for the appellant, in support of the motion.
Mr. Stanley Matthews, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The bill in this case shows upon its face that the suit was prosecuted by Glenny as a representative creditor, and that the other creditors named had the right to rely upon him for the protection of their interest, until notice to the contrary. On Saturday, the 13th January, Glenny, at Cincinnati, Ohio,

entered into a stipulation with the defendants, consenting to a dismissal of the suit on their paying the costs. A copy of this stipulation was, on the same day with its execution, served, at Cincinnati, on the counsel representing the complainant and those interested with him in the litigation, accompanied by a notice that a motion had been filed to dismiss the appeal in accordance therewith; but no time was named for the hearing. On the same day, the counsel for the defendants forwarded the stipulation to the clerk, with the request that it be docketed in accordance with the practice of the court. In the letter transmitting the motion it was intimated that there might be opposition, and in that event a request was made for notice, and information as to the practice in such cases.

On Tuesday, the 16th of January, the stipulation was presented to the court by Mr. Carpenter, at the request of the clerk, made upon the authority of the letter transmitting it, and the suit was dismissed. On Monday, the 15th January, the counsel for the complainant wrote the clerk from Cincinnati, asking him not to delay printing the record on account of the motion, and intimating that the motion would not be sustained. A memorandum was made upon this letter by the clerk, to the effect that he replied on the 20th January, giving notice of the dismissal on the 16th. The letter of the clerk in reply did not reach the counsel, and he had no notice of what had been done until about the first of this month, and immediately thereafter the present motion was made.

Under the circumstances, we think the motion to dismiss was improvidently granted, and the order to that effect entered Jan. 16, is, therefore, set aside. The notice of the motion was insufficient and irregular, as it designated no time for the hearing. It is evident, also, that the counsel for the complainant supposed, as he properly might, that he was to have further information of the time when the motion would be called up. No other questions argued upon the present motion are decided, but the cause is reinstated, and the parties placed in the same condition they would be if the order of dismissal had not been entered. *Motion granted.*

RUSSELL v. PLACE.

1. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.
2. In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep skin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. *Held*, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim, and invalid as to the others.
3. If, upon the face of a record, any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

Mr. Horace E. Smith for the appellant.

Mr. T. L. Wakefield, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit for an infringement of a patent to the complainant for an alleged new and useful improvement in the preparation of leather, and is similar in its general features to the suit of the complainant against Dodge, 93 U. S. 460. It is submitted upon substantially the same testimony, and pre-

sents, with one exception, the same questions for determination. That exception relates to the operation, as an estoppel against setting up the defences here made, of a judgment recovered by the complainant against the defendants in an action at law for the infringement of the patent.

The bill of complaint sets forth the invention claimed, the issue of a patent for the same, its surrender for alleged defective and insufficient description of the invention, its reissue with an amended specification, and the recovery of judgment against the defendants for damages in an action at law for a violation of the exclusive privileges secured by the patent.

The bill then alleges the subsequent manufacture, use, and sale by the defendants, without the license of the patentee, of the alleged invention and improvement, and prays that they may be decreed to account for the gains and profits thus acquired by them, and be enjoined from further infringement.

The answer admits the issue of the patent, its surrender and reissue, and, as a defence to this suit, sets up in substance the want of novelty in the invention, its use by the public for more than two years prior to the application for the patent, and that the reissue, so far as it differs from the original patent, is not for the same invention. The answer also admits the recovery by the complainant in the action at law of the judgment mentioned, but denies that the same issues were involved or tried in that action which are raised in this suit.

The action at law was brought in the Circuit Court of the United States for the Northern District of New York, in the ordinary form of such actions for infringement of the privileges secured by a patent. The defendants pleaded the general issue, and set up, by special notice under the act of Congress, the want of novelty in the invention, and its use by the public for more than two years prior to the application for a patent. The plaintiff obtained a verdict for damages, upon which the judgment mentioned was entered; and this judgment, it is now insisted, estops the defendants in this suit from insisting upon the want of novelty in the invention patented, and its prior use by the public, and also from insisting upon any ground going to the validity of the patent which might have been availed of as a defence in that action, and, of course, upon the

want of identity in the invention covered by the reissue with that of the original patent.

It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, — the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

Thus, in the case of the *Washington, Alexandria, & Georgetown Steam-Packet Company* v. *Sickles*, reported in the 24th of Howard, a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count upon a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

When the same case was before this court the second time, *Packet Company* v. *Sickles*, 5 Wall. 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, — that is, that the verdict in the suit

could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

Tested by these views, the question presented by the plaintiff in this case, upon the effect as evidence of the verdict and judgment in the action at law, is of easy solution. The record of that action does not disclose the nature of the infringement for which damages were recovered. The declaration only avers that the plaintiff was the original and first inventor of a new and useful improvement in the preparation of leather, and that he obtained a patent for the same, and, on its surrender, a new patent, with an amended specification, without describing with other particularity the nature and operation of the invention; and alleges, as the infringement complained of, that the defendants have made and used the invention, and have caused others to make and use it. The patent contains two claims: one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark tanned lamb or sheep skin by means of a compound composed and applied in a particular manner. Whether the infringement for which the verdict and judgment passed consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified, does not appear from the record. A recovery for an infringement of one claim of the patent is not of itself conclusive of an infringement of the other claim, and there was no extrinsic evidence offered to remove the uncertainty upon the record: it is left to conjecture what was in fact litigated and determined. The verdict may have been for an infringement of the first claim; it may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel, and does not conclude the defendants from contesting the infringement or the validity of the patent in this suit.

The record is not unlike a record in an action for money had

and received to the plaintiff's use. It would be impossible to affirm from such a record, with certainty, for what moneys thus received the action was brought, without extrinsic evidence showing the fact; and, of course, without such evidence the verdict and judgment would conclude nothing, except as to the amount of indebtedness established.

According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. See *Aiken* v. *Peck*, 22 Vt. 260, and *Hooker* v. *Hubbard*, 102 Mass. 245.

Decree affirmed

MR. JUSTICE CLIFFORD dissented.

NEW JERSEY MUTUAL LIFE INSURANCE COMPANY v. BAKER.

1. Counsel cannot, in requests to the court below, assume the existence of facts and ask a charge to the jury based upon such assumption; nor, upon argument here, insist that, because the assumption was made, this court is to consider the assumed facts as existing.
2. The doctrine in *Insurance Company* v. *Wilkinson*, 13 Wall. 222, and *Insurance Company* v. *Mahone*, 21 id. 152, as to the admissibility of parol testimony to show that the answers to questions in an application for a policy of life insurance, as construed, interpreted, and written down by an agent of the company, were not those of the applicant, affirmed and applied to this case.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. Dennis McMahon for the plaintiff in error.

The court declined to hear counsel for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

On the 28th of June, 1869, the New Jersey Mutual Life Insurance Company made its policy of insurance upon the lives of Anson M. Baker and Martha, his wife, undertaking, upon the death of either of them, to pay the survivor the sum of $10,000.

Martha Baker died on the 6th of December, 1870, and this action is brought to recover the amount insured by such policy. Upon a trial before the circuit judge and a jury, a verdict was rendered in favor of the plaintiff for the amount claimed.

The insurance company seeks to set aside the judgment rendered upon this verdict for the reasons following: —

1. That the court erred in refusing the request made by the defendant's counsel to direct the jury to find a verdict for the defendant, on the ground that the evidence was not sufficient to sustain a verdict for the plaintiff.

This request was based upon the allegation that there was undisputed evidence of a violation of "certain expressed warranties contained in their application, the 22d," which referred to the party's usual medical attendant, and the answer thereto; and also "in regard to question No. 7, what members of the party's family have died of or been afflicted with" certain diseases named, and the answers thereto.

It will not do for counsel, in requests to the court, to assume the existence of facts, and ask a charge to the jury based upon such assumption. *Gladmon* v. *Railroad Company*, 15 Wall. 401. Nor will it do for counsel, upon argument before this court, to insist that, because the counsel below made such assumption, we are to consider the assumed facts as existing. An examination of the record before us shows that the statements upon which the above request was made are without foundation. There is no evidence that the policy contained any agreement that the statements of the application should be express warranties, or that they should have any effect whatever; there is no evidence that the application, which was upon the trial assumed to have been made, and which contained the questions and answers referred to, was ever presented to the insurance company; there is no evidence that the policy of Mr. and Mrs. Baker was based upon such application; there is no evidence that the policy issued referred in any manner to this application, or that this application referred in any manner to the policy. On all these points we have no information. The record is absolutely silent as to each of them.

The only information we can obtain of the contents of the policy is from the complaint and the answer. The complaint, not

referring to any application, alleges the execution of a policy of insurance for the sum of $10,000 upon the lives of Baker and his wife, in consideration of the payment of the sum of $412.20 at the time of its issuance, and of the future annual payment of the same sum; alleges the death of the wife, notice to the company, the service of proofs, and performance of all the conditions required.

The company answered, admitting the allegations of the complaint, "except as hereinafter modified, and except the allegation that the plaintiff performed all the conditions of the policy," as to which it alleges a failure to perform, by reason of concealing certain information set forth. The answer also denies that the agreement to pay the sum named formed the sole consideration of the policy, but alleges that the representations made in the "application therefor" formed a part of the consideration.

The answer proceeds, "2dly, and as matter constituting a defence to the action," to allege the making an application in writing and the propounding of certain questions therein, and the answers thereto, and the agreement that such statements should form the basis of the contract of insurance; that, if untrue, the policy should be void, and alleging that such statements were untrue.

All the special matters thus set forth are matters in defence, and the burden of proving their truth rested upon the defendant. If this application formed the basis of the contract of insurance, the defendant should have made proof to that effect at the trial. If the plaintiff had stipulated that any untrue statement (whether material or not, whether wilfully false or mistakenly untrue) should destroy his policy, the defendant should have proved at the trial a fact so material. No such proof appears in the record.

By the course of the trial, it was assumed that an application had been made, and that it contained the questions and answers numbered as above set forth. It is, however, nowhere admitted or assumed that it formed the basis of the policy, or that the policy contained any stipulation in regard to it.

The facts upon which the requests to charge, not appearing by the record, cannot be assumed to exist; and, without examin-

ing whether they were properly refused, if the facts had been shown, we can give them no consideration.

The second general objection of the defendant is based upon an alleged error in admitting evidence of what took place when the answers to the questions already referred to were written in an application for insurance. These questions were put and the answers were written down by Dr. Wells, the agent of the insurance company, and the application was signed by Mrs. Baker. There were present Mr. and Mrs. Baker, Dr. Wells, the agent of the company, and Dr. Hibbard. The proceedings in relation to question No. 12 will illustrate the course of the trial. Question: "Have the party's parents, brothers, or sisters been afflicted with pulmonary or other diseases hereditary in their nature?" to which the answer was written, "No." Dr. Hibbard was asked to state the conversation that took place between himself, Dr. Wells, the agent of the company, and Mrs. Baker, when this question was put and answered. To this evidence objection was made, on the ground that the answer was in writing, and that it was not competent to vary the same by parol testimony. The objection was overruled, and the witness answered, "I asked in reference to the cause of the death of her brothers and sisters, whether they died of pulmonary consumption. She said it was reported that two or three of them died of pulmonary consumption, but there was a difference of opinion respecting that, and she was unable to decide, but her view of the question was they had not died of consumption." The same question was put on the trial to the plaintiff as had been put to Dr. Hibbard, and a similar objection was made. He gave the answer of Mrs. Baker as similar to that given by Dr. Hibbard, but more in detail as to the supposed causes of the deaths in the family. He adds: "After she had completed this answer, Dr. Wells said, that where she had no personal knowledge she was to answer, 'Don't know.' Dr. Wells then wrote out the answer. I did not see what he wrote." He testified also that the application was not read over to Mrs. Baker after being filled out by Dr. Wells.

The subsequent evidence of Dr. Wells was in some respects contradictory to this, he stating, among other things, that the answers were read over to Mrs. Baker; but as the question is

upon the admissibility of the evidence, it is not important to consider it.

It is manifest, upon the testimony of the witnesses, that Dr. Wells, the agent of the company, undertook to construe and interpret the answers of the applicant, and wrote down and inserted in the application his construction and interpretation of them, and not the answers themselves. The evidence objected to was admissible to show that the statement was not that of the applicant, although signed by her. The statement was one prepared by the company, for which it was responsible, and it cannot be set up to defeat its policy. *The Insurance Company* v. *Mahone*, 21 Wall. 152, is a full and satisfactory authority to this point, as is also *The Insurance Company* v. *Wilkinson*, 13 id. 222. In the former case the opinion was given by Mr Justice Strong, and in the latter by Mr. Justice Miller, and each of them contains a full and careful consideration of the precise question before us. These cases are so recent and so fully in point that further discussion is unnecessary.

The objections to the other questions are of the same character.

Upon the record before us there can be no doubt that the judgment should be affirmed; and it is *So ordered.*

UNITED STATES v. JOSEPH.

A. settled upon land belonging to the Indians of the village or pueblo of Taos, in New Mexico *Held*, 1. That he was not liable under the acts of Congress which prohibit a settlement by any person on land belonging, secured, or granted by treaty with the United States, to any Indian tribe. 2. That they have a complete title to their land, and are not an Indian tribe within the meaning of those acts.

ERROR to the Supreme Court of the Territory of New Mexico.

Mr. Solicitor Phillips for the United States.
Mr. S. B. Elkins, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

Sect. 2118 of the Revised Statutes, which was originally

enacted June 30, 1834, declares that every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey said lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of $1,000. By sect. 7 of the act of July 27, 1851, it was enacted "that all laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the Territories of New Mexico and Utah."

The case before us was an action brought by the United States in the proper court in the Territory of New Mexico, to recover the penalty denounced in the section above recited. The petition alleges that defendant "did make a settlement in, and now occupies and is settled on, lands of the pueblo tribe of Indians of the pueblo of Taos, in the county of Taos, to wit, ten acres of land (describing its boundaries), by then and there building houses and making fields thereon. . . . Said lands then and there, and at the time of bringing this suit, belonging to said pueblo tribe of Indians of the pueblo of Taos aforesaid, and secured to said pueblo tribe of Indians of the pueblo of Taos aforesaid, by patent from the United States."

A demurrer to this petition was sustained in the Supreme Court of the Territory, and we are called on to decide whether it was rightfully sustained.

Were the pueblo Indians, and the lands held by them, on which this settlement was made, within the meaning of the act of Congress of 1834, and its extension to the Territory of New Mexico, by the act of 1851? This question resolves itself into two other: —.

1. Are the people who constitute the pueblo or village of Taos an Indian tribe within the meaning of the statute?

2. Do they hold the lands on which the settlement mentioned in the petition was made by a tenure which brings them within its terms?

The first question is not concluded even on demurrer, because the petition calls them "the pueblo tribe of Indians of the pueblo of Taos;" for if these people, with others of the

same character, are a well-known class, whose history, domestic habits, and relations to the government are matters of public notoriety, the court, being informed who they are by the description of them in the petition, as "pueblo Indians of the pueblo of Taos," is not bound by the use of the additional word "tribe" to disregard that knowledge, and assume that they are tribal Indians within the meaning of the statute regulating the intercourse of the white man with this latter class of Indians.

The character and history of these people are not obscure, but occupy a well-known page in the story of Mexico, from the conquest of the country by Cortez to the cession of this part of it to the United States by the treaty of Guadaloupe Hidalgo. The subject is tempting and full of interest, but we have only space for a few well-considered sentences of the opinion of the chief justice of the court whose judgment we are reviewing.

"For centuries," he says, "the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country, they have adopted mainly not only the Spanish language, but the religion of a Christian church. In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic religion, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all of their blankets, clothing, agricultural and culinary implements, &c. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian

tribes of the country, and the equal of the most civilized thereof. This description of the pueblo Indians, I think, will be deemed by all who know them as faithful and true in all respects. Such was their character at the time of the acquisition of New Mexico by the United States; such is their character now."

At the time the act of 1834 was passed there were no such Indians as these in the United States, unless it be one or two reservations or tribes, such as the Senecas or Oneidas of New York, to whom, it is clear, the eleventh section of the statute could have no application. When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government.

The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

If the pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this

regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking.

We have been urged by counsel, in view of these considerations, to declare that they are citizens of the United States and of New Mexico. But abiding by the rule which we think ought always to govern this court, to decide nothing beyond what is necessary to the judgment we are to render, we leave that question until it shall be made in some case where the rights of citizenship are necessarily involved. But we have no hesitation in saying that their *status* is not, in the face of the facts we have stated, to be determined solely by the circumstance that some officer of the government has appointed for them an agent, even if we could take judicial notice of the existence of that fact, suggested to us in argument.

Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government.

It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe.

The pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution, — a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadaloupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States.

With the purpose of carrying into effect this provision of that treaty, Congress directed the surveyor-general of New Mexico to make inquiry into all grants of the Spanish and Mexican governments, and to report to that body on their

validity. Such reports were made from time to time, one of which included, and recommended for confirmation, this claim of "the pueblo of Taos, in the county of Taos," not the pueblo Indians of Taos, but the pueblo of Taos; and by an act of Congress of Dec. 22, 1858, 11 Stat. 374, the title was confirmed, and the commissioner of the land-office ordered to "issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and cause a patent to issue therefor, as in ordinary cases to private individuals: *Provided*, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right.

If the defendant is on the lands of the pueblo, without the consent of the inhabitants, he may be ejected, or punished civilly by a suit for trespass, according to the laws regulating such matters in the Territory. If he is there with their consent or license, we know of no injury which the United States suffers by his presence, nor any statute which he violates in that regard. *Judgment affirmed.*

NOTE. — In *United States* v. *Santistevan*, a suit for a similar offence, and brought here by writ of error to the same court, the same judgment was entered as in the preceding case.

ERSKINE *v.* MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* ERSKINE.

A penalty of $1,000 is the only liability incurred by a railroad company for failing to comply with the provisions of sect. 122 of the internal revenue act of June 30, 1864 (18 Stat. 284), as amended by the act of July 13, 1866 (14 id. 138).

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was an action brought by the Milwaukee and St. Paul Railway Company against Erskine, collector of internal revenue for the First Collection District of the State of Wisconsin, to recover $17,296.12 paid by the company under protest in the year 1870, and by him claimed to be due from it for taxes under the laws of the United States.

There was a judgment in favor of the company for $3655.07 and costs. Each party excepted to the rulings of the court below, and sued out a writ of error. The exceptions of the company were abandoned here. The only question submitted was, whether the company was liable for any sum beyond the penalty of $1,000 for its default in paying the tax of five per cent upon the amount paid to the holders of the coupons, which represented the interest on its bonds, and upon the dividends payable to its stockholders.

The court below held that the company was not so liable.

Mr. John W. Cary for the company.
Mr. Assistant Attorney-General Smith, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

No error has been assigned by the railroad company upon this record, for the reason that the rulings to which the company took exceptions are all sustained by our decisions in *Barnes* v. *Railroad Companies*, 17 Wall. 294, and *Stockdale* v *Insurance Companies*, 20 id. 323.

We think that the Circuit Court was right in holding that the only penalty to which the company was liable for default under sect. 122 of the internal revenue act of June 30, 1864, 13 Stat. 284, as amended July 13, 1866, 14 id. 138, was that of $1,000 specially provided for in that section. The penalty of five per cent and interest at the rate of one per cent per month, apply only to cases of default in the payment of duties upon incomes imposed by sect. 119 as amended. 13 id. 283; 14 id. 480.

Judgment affirmed, the costs incident to each writ to be paid by the party suing it out.

EAMES v. HOME INSURANCE COMPANY.

1. The correspondence in this case considered, and held to create a valid contract for a policy of insurance in the Home Insurance Company of New York for $4,000 on the mill and machinery of the complainants, situated at Staunton, Ill., for one year from Oct. 12, 1872, at the rate of six and a half per cent premium.
2. It appearing that the property was destroyed by fire Oct. 29, 1872, whereby loss and damage accrued to the complainants to the whole amount of insurance, that due proof and notice were given, and that the premium for said insurance was tendered and refused, the complainants are entitled to a decree against the defendant for $4,000, less the amount of said premium, with interest and costs.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Mr. J. C. Robinson for the appellant.

Mr. George O. Ide, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a bill in equity filed in the court below by Eames and Cooley, the appellants, against the Home Insurance Company of New York, the appellees, to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois, and for such other and further relief as shall be just and equitable. The court below, upon hearing, dismissed the bill.

The contract referred to is alleged to have been made by means of certain parol communications and written correspondence, which are detailed and set forth in the record. The subject on which insurance was desired by the complainants was a flouring-mill and its machinery situated at Staunton, in Macoupin County, Ill., which was destroyed by fire in the night of 28th of October, 1872. Cooley, one of the complainants, had previously procured insurance on the same property from the defendant in February, 1870, which had run for two years, and had then been permitted to expire. The amount of insurance at that time was $3,500, and the rate five per cent

per annum. The policy was issued on the 28th of February, 1870, but ran one year from the 14th of that month, and was renewed for a second year by the payment of a second premium in 1871.

Cooley having taken Eames into partnership and sold him half of the property, the application for the insurance in question was made in their joint names. The negotiations were commenced on the twelfth day of October, 1872, at Bunker Hill, in Macoupin County, between Eames and James A. Beach, the company's local agent at that place. They had a general agent, A. C. Ducat, at Chicago; and it seems that local agents were not authorized to take extra-hazardous risks, to which class the property in question belonged, without referring to the general agent.

At the interview referred to, Eames, there being then no insurance on the mill, applied to Beach, who was agent for the Home Insurance Company of New York, and of the Hartford and Phœnix companies of Hartford, Conn., for $9,000 insurance; and an application to the Home Insurance was made out on a printed blank of the company for $4,000, at five and a half per cent. The application, numbered 105, was duly filled up with answers to the various questions, and signed by Eames, in the name of "Eames & Cooley," and dated the twelfth day of October, 1872. From an agreement as to certain facts made by the attorneys in the cause, it appears that said Beach forwarded said application by mail to Arthur C. Ducat, the general agent, in a letter, of which the following is a copy: —

"[Office of James A. Beach, notary public and insurance agent. Represents Home Insurance Company of New York, Hartford of Hartford, Phœnix of Hartford, Andes of Cincinnati.]

"BUNKER HILL, ILL., Oct. 12, 1872.

"A. C. DUCAT, Esq., *Genl. Agt.:*

"DEAR SIR, — I enclose app. for ins. which you have carried for two years, and was not renewed in Feb'y, because I asked 5½ (you were carrying it at 5 per cent). They now want to insure again. The other large mill in Staunton has lately burned, which is, I suppose, the reason. I have not learned the particulars, but some think the owners burned it.

"Yours truly, JAS. A. BEACH."

That, on the 14th October, 1872, said Ducat received said letter of Beach and its enclosure, and wrote to said Beach in respect thereto a letter, whereof the following is a copy: —

"[Home Insurance Company of New York. General agency for States of Illinois, Indiana, Wisconsin, and Minnesota. Arthur C. Ducat, general agent.]

"CHICAGO, Oct. 14, 1872.

"JAS. A. BEACH, *Agt.*, Bunker Hill, Ill.:

"DR. SIR, — We have yours of the 12th, and application of Eames & Cooley on flour-mill at Staunton. Our present rate on this risk will not be less than 6½ per cent, which is probably more than they will pay. If they wish a Home policy at that rate let us know, and we will send you ticket.

"Truly yours, ARTHUR C. DUCAT, *Genl. Agent.*"

Which letter was returned to said Ducat by mail by said Beach, Oct. 18, 1872, with the indorsement in the handwriting of said Beach: —

"The Phœnix will carry $3,000 at 6 per cent; will you not do the same? Yours truly,

"JAMES A. BEACH."

Across which is indorsed, in pencil, Oct. 18, 1872, in the handwriting of said A. C. Ducat: —

"No; 6½ per cent is our rate."

On Oct. 18, 1872, said Ducat mailed to said Beach a letter, of which the following is a copy: —

"[Letter-head of Chicago general agency.]

"CHICAGO, ILLS., Oct. 18, 1872.

"JAMES A. BEACH, *Agt.*, Bunker Hill, Ill.:

"DR. SIR, — Yours received. We cannot go under 6½ per cent on Eames & Cooley flour-mill.

"Truly yours, ARTHUR C. DUCAT, *Genl. Agent.*"

At this point Eames testifies that he received a letter from Beach, on or about the twenty-second day of October, 1872 (which was destroyed by the fire in the mill, and, therefore, could not be produced), in which Beach stated that he had received an answer from the Home Company, and that they would not take the risk for less than six and a half per cent.

He further testifies that this letter enclosed an application to the Hartford Insurance Company, partly filled up by Beach, and sent to him (Eames) to answer some of the questions, and to be signed by him; that, in a previous conversation between him and Beach, his complement of insurance not being made up by the four thousand that the Home would take, and the three thousand that Phœnix would take, Beach told him that he was agent for the Hartford, but did not know whether they would take any risk, but that he would write them, and, if they would, he would send him (Eames) an application to fill out; that, in a day or two after, the letter referred to came, enclosing the said application to the Hartford, filled up for $2,000, at the rate of six per cent; that the letter added that he (Beach) had not heard from the Hartford Company, but as he was going to write to him (Eames) in regard to the Home proposition, he enclosed the Hartford application, partly filled up, for Eames to finish and return, so that, if the Hartford Company would take the risk, he would have the application ready to send right on. In answer to this letter of Beach, Eames says he wrote his next letter, enclosing the application to the Hartford Company, and accepting the proposition of the Home Company.

It is admitted that he wrote, and that Beach received, the following letter on or about Friday, the 25th of October, 1872, enclosing the application referred to, filled up and signed; namely: —

"STAUNTON, ILL., Oct. 25, 1872.

"Mr. JAMES A. BEACH, Bunker Hill, Ill.:

"DEAR SIR, — I believe I have answered all the questions necessary, and to the best of my knowledge. 6½ per cent is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present.

"Yours, &c., EAMES & COOLEY."

On Monday, the 28th of October, 1872, Beach mailed a letter to Ducat, the general agent, of which the following is a copy: —

"BUNKER HILL, Oct. 28, 1872.

"Hon. A. C. DUCAT.

"No. 105, Staunton Mill, @ 6½.

"DEAR SIR, — Please send me a ticket for $4,000, ins. on appl'n.

"Yours truly, JAMES A. BEACH."

Oct. 29, 1872, Beach sent telegraphic message to Ducat, of which the following is a copy: —

"[Dated Bunker Hill, Ill., 29, 1872; received at Chicago, Oct. 29, 11.20 A.M.]

"To A. C. DUCAT, Home Ins. Co.:

"Do not return ticket for mill insurance: it is burned.

"JAS. A. BEACH."

Oct. 29, 1872, Ducat mailed to said Beach a letter, of which the following is a copy: —

"[Home Insurance Company of New York, general agency for States of Illinois, Indiana, Wisconsin, and Minnesota. Arthur C. Ducat, general agent.]

"CHICAGO, ILL., Oct. 29, 1872.

"JAS. A. BEACH, *Agt.*, Bunker Hill, Ill.:

"DEAR SIR, — Yours of the 28th, requesting ticket on the Staunton Mill, came duly this morning, and in a few minutes your telegram arrived announcing the burning of the mill. We came very near being caught, but are glad it is no worse. If we had not demanded the additional ½ per cent we should have had $4,000 to pay. Yours truly,

"ARTHUR C. DUCAT."

This is all the correspondence bearing upon the alleged contract, and the first question is, whether the clause in Eames's letter of Oct. 25, in these words, "Six and a half per cent is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present," refers to the negotiation with the Home Insurance Company, and was an acceptance of their terms. Eames insists that that was what he meant by it; and if he did, on or about the 22d of October, receive a letter from Beach of the purport which he states, it would seem that there could be little doubt on the subject. Mr. Beach, in giving his testimony, was at first uncertain whether he wrote a letter or not; he had no recollection of sending such a letter; and his final conclusion was, that he handed the application to the Hartford Company to Eames at Bunker Hill. Eames, on the contrary, testifies that he did not see Beach after being informed of the general agent's letter of Oct. 18, stating that the Home Company could not go under six and a

half per cent, until after the fire. The presumptions which apply in such cases are in favor of Eames's account. His testimony as to receiving the letter is affirmative, and his recollection of its contents circumstantial. Beach's is negative: he does not recollect writing it; and the interview in which he supposes he gave Eames the application to the Hartford may well be confounded with the interview they had when an application to the Hartford was first talked of. And Beach evidently understood the clause referred to in Eames's letter of the 25th as referring to the Home insurance negotiation, or he would not have written to Ducat for a ticket. He explains this by saying that he understood the clause as referring to the Hartford application enclosed in the letter, but as also meaning generally that Eames was willing to give six and a half per cent, and, therefore, he sent for the ticket for the Home insurance. This is, in effect, an acknowledgment that he understood it as referring to the one as well as to the other. Taking the evidence all together, we think that Eames's statement is correct, — that he did receive the letter which he says he did on the 22d; and that his own letter of the 25th was in answer to it. The form of language used by him, "I guess we will have to stand it," is not so ambiguous and uncertain as the appellees' counsel suppose. It is a form of expression often used in common speech, in this country, to indicate an affirmative statement. It was so understood and acted on by Mr. Beach. It is equivalent to saying, "We will take the insurance at that rate." And Ducat evidently understood the negotiation as closed, because he was on the point of sending the ticket when he received the telegram announcing the fire.

Supposing this to be the meaning of the correspondence, the next question is, whether it had the effect of creating a contract. Eames had put in an application for insurance. It was made out in the regular form. The property was fully described, the amount of insurance was named, and the rate of premium at five and a half per cent was proposed to be paid. Every thing was satisfactory to the general agent, except the rate of premium. No question was made about any thing else. The whole subsequent correspondence related to that alone. The agent required six and a half per cent instead of five and a half;

and finally, as we construe the letter of Eames, he (Eames) agreed to and accepted this modification. Supposing all the parties to be acting in good faith, as they were bound to act, had he not a right to suppose that the agreement was concluded, and that the risk was taken by the defendant? We do not well see how this conclusion can be avoided. He had not paid the premium, it is true; but it is shown that this was not required until the policy was made out and delivered. It had not been required of Cooley in 1870; and yet the policy in that case, when issued, was made to run from the date of the application, some two weeks prior to its issue, and, of course, covered the risk during that antecedent period.

If parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in a different State, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable. As said by Mr. Justice Field in the case of *The Insurance Company* v. *Colt*, 20 Wall. 567, "It would be impracticable [for a company] to carry on its business in other cities and States, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law," he continues, "distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies."

But it is objected, in the next place, that the contract, if one was made, was not complete and precise in its terms; that it did not state the period of time during which the risk was to continue, and did not state what kind of a policy (of two or three different kinds which the Home Company used) Eames wished to have. It does appear that the application, which was signed on the 12th of October, did not (as is usually done)

call for a statement of the period of insurance. It was one of the company's own printed blanks, and the probability is, that the reason this item was not inserted was the almost universal practice of taking ordinary insurance against fire for a year. Nothing else seems to have been in the minds of the parties. The former insurance on the property had been for that period. The bill states that Eames applied to Beach for a contract of insurance and policy on the mill for a year; and this is not denied in the answer: the application to the other companies, the Phœnix and the Hartford, seem to have been for a year. Mr. Beach, in his testimony, when asked by the counsel of defendant whether any thing had been said as to the length of time the complainants wanted insurance in the Home, promptly answered, "If I mistake not, the application states 'for one year;'" and was only convinced to the contrary after an inspection of the document. The premium is constantly spoken of by the witnesses and in the letters as so much per cent absolutely, — six and a half per cent, — without adding "per annum;" and yet we know that a year's premium was meant. It may be said that this is the usual mode of speaking when rate per annum is intended. This is undoubtedly true when an ordinary policy for a year is the subject of discussion. But when insurance for a fractional part of a year, or any unusual period, is proposed or spoken of, it is not the customary mode of speaking. It is then usual to add the words "per annum," in order to avoid mistake. We think it perfectly manifest, from all the evidence taken together, that the parties meant and intended an insurance for a year, and had nothing else in their minds. This is the inference to be drawn from all their conduct, conversations, and correspondence; and we should be sticking in the bark to ignore it.

The plea that no time for the continuance of the insurance was stipulated for is evidently a mere afterthought.

There is no difficulty as to the time when the risk was to commence. It was the practice of the defendant, as it is of most, if not all, other companies, to antedate the policy to the time of making the application; which, in this case, was on the twelfth day of October, 1872. This practice is more beneficial to the companies than to the insured. They are not liable until the con-

tract is completed, and if a loss occurs before its completion they have nothing to pay; and yet they get the benefit of the premium for this period whenever the contract is completed.

As to the plea that the contract does not specify what kind of a policy was desired, it does not appear that the complainants had any knowledge or notice that the defendant issued different kinds of policies. As Eames justly said, he supposed (as he had a right to suppose) that they would get the same kind of policy which had been issued on the property before. If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted. It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it.

As to the objection that the application in this case does not truly set forth the title of the complainants and the amount and nature of the incumbrances on the property, and the amount of insurance in other companies, it is sufficient to say that the evidence abundantly shows that all the facts were fully and frankly communicated to Beach, the agent of the company, and were indeed known to him before; and that he wrote down the answers according to his view of their bearing and legal effect, Eames relying entirely on his experience in such matters. There is no reason to suppose that either Eames or Beach did not act in entire good faith in the transaction. And, indeed, it cannot be pretended that the facts were not substantially as represented in the application. The complainants are represented to be the owners of the property, which is stated to be subject to a mortgage for $6,000. The fact was, that they had

purchased the property for $12,000, and had paid $6,200 of the purchase-money, the vendor having a lien for the balance of $5,800; but no deed had ever been given. So that, in truth, the complainants did not hold the legal title, although they had an equitable one; and had not given a mortgage, although the vendor's lien was equivalent to one. In another answer, however, explaining the mortgagee's interest, it is stated expressly to be a "lien on mill to secure payment of sale." As the exact facts were communicated to the agent, and he took the responsibility of stating them in the way he did, leading the applicant to suppose that it was all right, we think it would be great injustice to turn him out of court now for this inexact method of statement. According to the views expressed by this court in *Insurance Company* v. *Wilkinson*, 13 Wall. 222, and other more recent cases, the defendant was concluded by the act of its agent. The reference to collateral insurances in other companies is subject to the same consideration. The insurances were being applied for through this very agent who wrote the answers, and who knew the whole facts, and between whom and the general agent they had been referred to in their correspondence. The defence on this ground is utterly destitute of equitable consideration.

After giving due attention to the pleadings and evidence in this case, we are forced to the conclusion that a contract for a policy of insurance was fairly made, and that a decree should have been rendered for the complainants, declaring them entitled to a policy of insurance to be issued by the defendant, in the usual form in such cases, for $4,000 on the mill and machinery of the complainants, situated at Staunton, in the county of Macoupin, Ill., to run and be in operation for one year from the twelfth day of October, 1872, at the rate of six and a half per cent premium; and, as it appears that the said property was destroyed by fire on the twenty-ninth day of October, 1872, whereby loss and damage accrued to the complainants to the whole amount of the said insurance, and that due proof and notice of such loss was given, and that the premium for said insurance was tendered and refused, it should be further decreed that the defendant pay to the said complainants the said sum of $4,000 (less the amount of said premium), with interest and costs.

See *Taylor* v. *Merchants' Insurance Co.*, 9 How. 405; *Perkins* v. *Washington Insurance Co.*, 4 Cow. (N. Y.) 666; *Carpenter* v. *Mutual Safety Insurance Co.*, 4 Sandf. (N. Y.) Ch. 410.

Decree reversed, and cause remanded with directions to enter a decree in conformity with this opinion, and to take such further proceedings as law and equity may require.

COMMISSIONERS OF JOHNSON COUNTY v. THAYER.

1. Under the act of the legislature of Kansas, approved Feb. 10, 1865, authorizing the board of county commissioners of any county to, into, through, from, or near which any railroad is or may be located, to subscribe to the capital stock of the company, the location of the road is not a condition precedent to submitting the question of subscription to a vote of the qualified electors of the county.
2. A proposition was submitted to the electors of Johnson County, whether the board should be "authorized to subscribe capital stock in the name and for the benefit of Johnson County, in the sum of $100,000, to aid in the construction of a railroad commencing at or near the Union Depot, on the south side and near the mouth of the Kansas River, and near Kansas City; thence to Olathe, in Johnson County; thence, in a southerly direction, through said county to the southern boundary of the State of Kansas." *Held*, that, under the statute, this was a sufficiently specific description of the route of the contemplated road, and that it was not necessary to insert the name of the company constructing it.
3. Irregularities or informalities, not involving the question of jurisdiction nor affecting the result of the vote, do not impair the validity of the bonds issued pursuant to the election; and the Curative Act of Feb. 25, 1868, was intended by the legislature of Kansas to reach the bonds issued before as well as those after its passage.
4. Notice to one of the trustees appointed by the company in its deed mortgaging its property, including the county bonds, to secure the payment of its bonds, issued and negotiated for value to third parties, does not, in a suit by the trustees to enforce the payment of the county bonds, operate to destroy the *bona fide* holding of such parties.

ERROR to the Circuit Court of the United States for the District of Kansas.

This action was commenced by Nathaniel Thayer, F. W. Palfrey, and George W. Weld, to recover the amount due upon interest coupons attached to certain bonds, originally issued, to the amount of $100,000, by the county of Johnson, in the State of Kansas, to the Kansas and Neosho Valley Railroad

Company, in payment of a subscription of like amount made by it to the capital stock of that company. The bonds and coupons, although varying in amounts and in the dates of payment of the several coupons, are in the same form. The following is a copy of one of them: —

"No. 1.] UNITED STATES OF AMERICA. [$1,000.

"STATE OF KANSAS.

"*Stock Bond of Johnson County, Kansas.*

"Thirty years after date, Johnson County promises to pay to Kansas and Neosho Valley Railroad Company (a corporation organized and created under a general law of the State of Kansas, by virtue of a certificate of incorporation, filed and recorded in the office of the secretary of the State of Kansas, under date of March the 8th, 1865), or bearer, the sum of $1,000, for value received, with interest at the rate of seven per cent per annum, payable semiannually at the Ninth National Bank in the city of New York, from and after the first day of January, 1867.

"By order of the board of county commissioners of the county of Johnson, State of Kansas.

"OLATHE, KANSAS, Sept. 3, 1866.

"D. M. WILLIAMS,

"*Chairman Board County Commissioners, Johnson County.*

"[L. S.] Attest: F. E. HENDERSON, *Clerk.*"

"*Coupon.*

"OLATHE, KANSAS, Sept. 6, 1867.

"Treasurer Johnson County will pay to bearer thirty-five dollars in the city of New York, being semiannual interest due on the first day of January, 1872, on the bond of the county of Johnson, No. 1, to the Kansas and Neosho Valley Railroad Company, issued in pursuance of an order of the county commissioners of said county, dated Sept. 3, 1866.

"D. M. WILLIAMS,

"*Chairman Johnson County Commissioners.*

"F. E. HENDERSON, *County Clerk.*"

The bonds are indorsed as follows: —

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that such bond has been duly registered in my office, in accordance with an act of the legislature

entitled 'An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other work of internal improvement, and providing for the registration of such bonds, and the repealing of all laws in conflict therewith.' Approved March 2, 1872.

"Witness my hand and official seal this sixteenth day of April, 1872.

"[L. S.] A. THOMAN, *Auditor of State.*"

The authority to the county to subscribe was conferred by the first section of c. 12 of the laws of Kansas for the year 1865, which is set out in the opinion of the court. The following proposition was submitted to the electors of the county: —

"Whereas, on the fourteenth day of February, A.D. 1865, an act of the legislature of the State of Kansas took effect and became in full force, entitled, 'An Act to authorize counties and cities to issue bonds to railroad companies;' and whereas, by law, the board of county commissioners are authorized to call a special election of the qualified electors of the county, to determine whether the said board of county commissioners shall subscribe, in the name of the county, to any railroad corporation to construct a road into or through the county;

"It is therefore ordered, that a special election of the qualified electors of Johnson County be held at the several voting precincts in said county, on the seventh day of November, 1865; that said election shall, in regard to qualifications of electors, and the manner of receiving votes, and the manner of conducting said election, be according to the laws in force governing elections.

"The question submitted to the qualified electors at said election shall be, whether the board of county commissioners shall be authorized to subscribe capital stock in the name and for the benefit of Johnson County, in the sum of $100,000, to aid in the construction of a railroad commencing at or near the Union Depot, on the south side and near the mouth of the Kansas River, and near Kansas City; thence to Olathe, in Johnson County; thence, in a southerly direction, through said county to the southern boundary of the State of Kansas;

"In case a majority of said electors shall vote for subscription to the capital stock of said railroad, the board of county commissioners shall issue the bonds of said county of Johnson, in such

amounts as they may deem best, in payment of said stock: *Provided*, that no part of said bonds shall be issued until work on the said railroad shall be actually commenced in said county, and then only in *pro rata* assessments as the work progresses; *and provided, further*, that the whole of said sum of $100,000 shall be expended within the limits of said county; which said bonds shall bear interest at a rate not exceeding seven per cent per annum, and shall be payable within thirty years.

"The ballots of said election shall be written or printed: 'For subscription to railroad;' 'Against subscription to railroad.' If a majority of all the votes cast at said election be for subscription to railroad, the board of county commissioners shall be authorized to subscribe stock to said railroad in the name and for the benefit of Johnson County, and to issue bonds in the manner heretofore stated. All books shall be kept at the several voting precincts by the judges and clerks of said election, showing the whole number of votes polled for and against said subscription to railroad.

"The votes shall be counted by the judges of said election, and the result proclaimed, and the poll-books signed by the judges and attested by the clerks as nearly in accordance with sects. 18 and 23, p. 459, Stat. of 1862, as may be practicable. After canvassing the votes, the judges shall seal up and return the poll-books to the county clerk on or before the Friday next following said election, and within three days after said election deposit one copy of said poll-books with the township trustee, and shall also preserve the ballots used at said election. Sects. 25 and 26, p. 497, and Code 1862.

"The county clerk and commissioners will meet in Olathe on Friday next following said election, to canvass and declare the result, and make a record thereof.

"*Ordered*, that the foregoing order and notice be published in the 'Olathe Mirror,' twenty days prior to said election.

"DAVID M. WILLIAMS, *Chairman*.

"Attest: F. E. HENDERSON, *County Clerk*."

A majority of the electors voted at the time named, and in the several precincts of the county, in favor of the subscription; and, on the 3d of September, 1866, the county commissioners made it, and it was accepted by the company.

In April, 1867, a call was made by the board of directors of the company, upon all of their subscribers for stock, for the whole amount unpaid upon their subscriptions.

On the sixth and twenty-seventh days of September, 1867, the county commissioners issued and delivered to the company, in part payment of the county subscription, bonds to the amount of $50,000, which are a part of those in question.

On June 19, 1868, the following contract was entered into between the president of the company and the commissioners of Johnson County, to wit: —

"Know all men by these presents, that we, the Board of County Commissioners of Johnson County, in the State of Kansas, in consideration that the Kansas and Neosho Valley Railroad Company shall construct and put into operation a railroad from a point near Kansas City, Missouri, by way of Olathe, to the southern boundary line of said Johnson County, in the direction of Paola, Kansas, within eight months from this date, and in consideration of one dollar to be paid by said railroad company, we hereby agree and bind ourselves, for and in behalf of said Johnson County, to assign and transfer to said railroad company, or their successors, the $100,000 of stock heretofore voted and subscribed by said Johnson County to the capital stock of said railroad company; and we do further agree, in consideration of the premises aforesaid, to cause to be issued, without delay, the $50,000 of bonds of the said county remaining unissued and unpaid on the $100,000 of stock, so as aforesaid voted and subscribed, and place said $50,000 of bonds in the hands of J. E. Hayes, who shall hold said bonds as the trustee and agent both of said Johnson County and said railroad company, to be delivered by said J. E. Hayes to said railroad company, or their successors, on their constructing and putting in operation said railroad from said point near Kansas City to Olathe: *Provided*, said railroad shall be constructed and put in operation to Olathe within five months from this date.

"And we further agree, in consideration of the premises aforesaid, that in any election of the stockholders of said railroad company which may be held prior to the transfer of the $100,000 of stock as above provided for, and while said railroad company may be engaged in good faith in performing the conditions upon which such transfer of stock is to be made, that we will cast the votes to which said county may be entitled as a stockholder, in such manner and for such persons as said railroad company, or their successors, may request.

"It is hereby expressly understood, that if said railroad company shall fail to comply with the conditions above mentioned, then this

agreement shall be null and void; but, if the said company, or their successors, shall fully comply with all of said conditions, then this agreement shall be binding and in full force.

"Witness our hands at Olathe, this nineteenth day of June, A.D. 1868.

"B. F. HOLLENBACK,
"*Chairman Board of County Commissioners.*
"JOHN BRADY, *Associate Commissioner.*"

The county commissioners of Johnson County executed, June 22, 1868, the remaining bonds, to the amount of $50,000, and placed the same "in escrow" with Josiah E. Hayes, to be delivered to said railroad company, upon its compliance with the terms of this contract.

On Oct. 5, 1868, the county commissioners, at the instance of the president of the railroad company, made the following order extending the time for completion of the road to Olathe: —

"Whereas, by mutual agreement, the commissioners of the county of Johnson have granted to the Kansas and Neosho Railroad Valley Company an extension of time, from the nineteenth day of November next to the fifth day of December next, within which to construct their said road to the town of Olathe, according to the provisions, in other respects, of a resolution, ordinance, or agreement passed or entered into on the nineteenth day of June, A.D. 1868, by the said county commissioners, entitling the said railroad company to the bonds and stock of said county voted and subscribed to said company. It is therefore resolved by the commissioners of Johnson County, that, in the event said railroad company shall so construct to the town of Olathe their said road on or before the fifth day of December, in manner prescribed in the resolution, ordinance, or agreement passed June 19, 1868, the trustee or commissioner named therein shall, and is hereby instructed and empowered to, deliver and assign to said railroad company the said stock and remaining bonds of said county as heretofore authorized and instructed, the same in all respects as though the said road had been constructed to the town of Olathe on or before the nineteenth day of November, 1868.

"B. F. HOLLENBACK, *Chairman Board.*
"JOHN BRADY.
"K. COATES, *President Railroad Co.*"

The company completed its road according to the terms of the agreement; and, on the fifteenth day of December, 1868, said Hayes delivered to it the remaining bonds. They were signed by said Hollenback as chairman; but in other respects, except as to said date, are similar to the bond, of which a copy is above given.

On or about March 29, 1869, and before the maturity of any of the coupons in suit, the company, having previously changed its corporate name to "Missouri River, Fort Scott, and Gulf Railroad Company," executed a mortgage or deed of trust, bearing date Jan. 1, 1868, upon its railroad and other property, including the bonds in question, to the plaintiffs as trustees, to secure the payment of five thousand negotiable bonds, of $1,000 each, bearing the same date as the deed of trust, which the company, before the maturity of any of the coupons now in suit, had issued and transferred, for value, to various persons, by whom they are still held.

Immediately after the execution of the deed, the company delivered the county bonds in question to the plaintiffs, who have ever since held them.

All of the coupons for interest that matured prior to those in suit were regularly paid by the county, with funds raised by the levy and collection of a tax for that purpose.

Thayer, one of the plaintiffs, had notice of all the facts connected with the issue of the county bonds; of the agreement of June 19, 1868; of the assessment of the stock by the company, and of its non-payment; and of the issue of stock as a bonus to the purchasers of the bonds of the railroad company, and of the facts connected with the completion of the road to Olathe: but the other plaintiffs had no such notice, nor had the purchasers of the railroad bonds.

The Curative Act, as it is termed, of Feb. 25, 1868, is set forth in the opinion of the court. The action was tried by the court without a jury, and a special finding of facts made. The court found, as a conclusion of law, that the plaintiffs were entitled to recover the amount of the coupons declared on. Judgment was entered accordingly. The defendants sued out this writ of error.

Mr. Nelson Cobb for the plaintiffs in error.

Mr. Wallace Pratt, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The recovery by Thayer and others of the amount of the coupons sued upon is challenged upon various grounds.

1. It is contended that no authority to subscribe for the bonds was conferred by the vote of Nov. 7, 1865, for the reason that no particular railroad was referred to in the vote on that occasion. The question was submitted to the voters of Johnson County, in the form of an inquiry, whether the commissioners should be authorized to subscribe capital stock to the amount of $100,000, to aid in the construction of a railroad commencing at or near the Union Depot, on the south side of and near the mouth of the Kansas River, and near Kansas City; thence to Olathe, Johnson County; thence, in a southerly direction, through said county to the southern boundary of the State of Kansas. Assuming that the road to which the subscription was made met the terms required, it is insisted that the question of subscribing to the particular railroad company by name should have been submitted to the electors, and that there must have been an actual location of the road before the election was held.

We had occasion to consider a question similar to the latter branch of this objection in *County of Callaway* v. *Foster*, 93 U. S. 567, and held that the objection was not a valid one.

In that case the statute authorized a subscription by any county "in which any part of the route of said railroad may be." The road was not built, located, nor organized. The court there intimated that, where this language was used in reference to a road which was yet to be built, it could be applied to any county in which the road might by law be located.

The road to which subscription was in this case made was, in fact, located in the county of Johnson, and the work upon it commenced before any of the bonds were executed or delivered, — was actually built through the county, and is now there operated. We think a previous location of the road was not required by the terms of the statute.

Was it necessary that the particular road to which a subscription was intended to be made should be described in the proposition submitted to the popular vote, or was the general language used in this case a compliance with the law?

The following is the section of the act of Feb. 10, 1865, controlling the question: —

"SECT. 1. That the board of county commissioners of any county to, into, through, from, or near which, whether in this or any other State, any railroad is or may be located, may subscribe to the capital stocks of any such railroad corporation, in the name and for the benefit of such county, not exceeding in amount the sum of $300,000 in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment for said stocks: *Provided*, that such bonds shall be issued only in payment of assessments made upon all the stocks of such railroad company, which bonds shall bear interest at a rate not exceeding seven per cent per annum, and shall be payable within thirty years. And the said board of commissioners shall elect one of their number, who shall not be a stockholder, to cast the vote of the county at any election for directors, or at any meeting of the stockholders of such company; and said board of commissioners shall annually levy and collect, at the same time and in the same manner that general taxes are levied and collected, a tax sufficient to pay the annual interest on such bonds, and to create a sinking fund for their redemption. But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners, by first giving twenty days' notice in some newspaper published and having general circulation in the county; or, in case there be no paper in the county, then by written or printed notices posted up in each election precinct; and, in submitting said question, said board of commissioners shall direct in what manner the ballots shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same."

This language, in relation to the road to which the subscription may be made, is as general as words can make it. The board of commissioners may subscribe to the capital stock of "any railroad" which is or may be located in or near the county they represent, and may issue the bonds of the county in payment for said stocks. "But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county." In neither of these clauses is there a qualification that the particular road shall be

named in the submission, or that any detail shall be set forth. The burden of bonds shall not be imposed upon the county except by the previous assent of a majority of the electors. When the burden is assumed by the electors, it is quite reasonable that it should be left to the county board to select the particular corporation in which the stock shall be taken. That trust can be there executed as wisely and judiciously as at a mass meeting of the voters.

The electors here voted to take stock in a corporation to aid in the construction of a road "commencing at or near the Union Depot, on the south side of and near the mouth of the Kansas River, and near Kansas City; thence to Olathe, Johnson County; thence, in a southerly direction, through said county to the south boundary of the State of Kansas."

We think this was a sufficiently specific statement to be submitted to the voters for their approval or disapproval.

We cannot, however, think that this is a vital point, even if there was a defect in this respect. The question of subscribing for the stock and issuing the bonds for a road from the mouth of Kansas River to the south boundary of the State was submitted to the electors of Johnson County. Notice was given for the time required by the statute, and a full and fair vote was taken, so far as we are informed. The approval of the electors by their vote, at a meeting called for that purpose, is the object of the statute. Defects, irregularities, or informalities, which do not affect the result of the vote, do not affect its validity. The defect we are considering, if it is a defect, does not go to the question of jurisdiction, and does not impair the validity of the bonds.

The case of *Lewis* v. *Commissioners of Bourbon County*, 12 Kan. 186, is cited on this point. In that case, four questions were passed upon by the Supreme Court of Kansas: *First*, Was the presentation of a petition, signed by one-fourth of the qualified voters, a condition precedent to the valid action of the commissioners? *Second*, Did the failure to name the corporation in the propositions submitted to the electors avoid the whole proceedings? *Third*, A majority of the votes of the electors having been cast against the proposition to issue bonds, was the county board authorized to issue them? *Fourth*, Did the

subsequent submission, and the proceedings thereon, confer the authority to issue the bonds?

The court held that the first objection was cured by the act of 1868. The second and the third objections were held to be fatal, and that the case was not relieved by the proceedings referred to in the fourth objection.

The court did, in its language, hold that the objection raised in the present case, to wit, that the name of the corporation was not inserted in the proposition for the popular vote, was fatal. Had this been the only or an indispensable part of the decision, we should have been called upon to inquire whether the decision was one of that class of State decisions upon its own statute that was binding upon us. The other question, however, existing and decided in that case, was, in its nature, so exclusive and so controlling that any thing said or professed to be decided beyond it does not require much consideration. The court held that, in the exercise of its general jurisdiction, it had the power to inquire into the number of votes actually cast for and against the proposed issue of bonds; and, upon making such inquiry, it found and determined that, in fact, a majority of the votes cast were cast against the proposition. Upon this point all the decisions of this court, and, so far as we know, of all other courts, concur. If a majority of the electors cast their votes against the proposition to issue bonds, the entire foundation of the proceedings is gone. There is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are all proceedings or issues based upon it. With this elemental failure existing in that case, other and further decisions tending to the same result are not to be regarded as authority.

The Gulf Railroad v. *Commissioners of Miami County*, 12 id. 234, is based upon the case above referred to, and follows it, without examination or discussion. It does not refer to the Curative Act of Feb. 25, 1868, which was held, in the Bourbon County case, not to be applicable to an election where a majority of votes was cast against the proposition, but which act, it was held, did relieve against the defect of the absence of the preliminary petition required by the statute. The court said that act was intended to sustain, and not to defeat, the will

of the people. This principle would have justified its application in relief of the defect before it, if there was such defect; and its consideration might well have altered the result. Both of these decisions were made after the bonds in this suit had been issued, and the interest upon them regularly paid for a considerable time. The road had been built as promised, the county of Johnson and its people enjoyed the anticipated benefits, and we are of the opinion that we are not bound to follow a decision which releases them from all the corresponding obligations. To this effect are the decisions of this court, made in the years 1865, 1871, and 1872. *Gelpcke et al.* v. *City of Dubuque*, 1 Wall. 175; *Bulls* v. *Muscatine*, 9 id. 571; *Olcott* v. *The Supervisors*, 16 id. 678.

The Curative Act of February, 1868, was intended by the legislature of Kansas to reach cases like the present, and to cover both the bonds issued before, as well as those issued after, its passage. It is as follows: —

"SECTION 1. Whenever a majority of the persons voting at any election called by the board of county commissioners of any county have heretofore voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the board of county commissioners of such county may subscribe to the capital stock of such railroad company or companies to the amount and on the conditions specified in the order of such boards of county commissioners in such cases, and pay such subscription, by issuing to each company bonds of such county at par, payable at a time therein to be fixed, not exceeding thirty years from the date thereof, bearing interest at the rate of seven per cent per annum, with interest coupons attached, whether such orders and elections, or either of them, have been in compliance with the statutes in such cases made and provided or not, or whether the proposition submitted at the election had was for the subscription of stock and the issuance of bonds to one or more railroad companies."

"SECT. 4. The provisions of this act shall be applicable in all cases where the election was held upon the subscription of stock and the issuance of bonds prior to the twenty-first day of January, A.D. 1868.

In the language before quoted, this act was intended to aid, and not to destroy, the proceedings in subscribing for stock

and issuing bonds. In this case, the election was held prior to the twenty-first day of January, 1868; and, although a portion of the bonds had been issued prior to the passage of the act, we are of the opinion that they are within its protection. It was intended to reach cases where the majority of the electors had voted in favor of issuing the bonds, "whether such orders and elections, or either of them, have been in compliance with the statutes in such cases made and provided or not."

It is contended, again, that, by an agreement made on the 19th of June, 1868, the stock of the county in the company was cancelled, and that, therefore, there was no consideration for the sale of the bonds.

By the agreement referred to, the county undertook to deliver to the road the $50,000 bonds, yet unissued, to sell and deliver its interest in the capital stock of the company, and in the mean time to cause its stock to be voted upon, as the company should direct, provided that the road should be built and completed to the southern boundary of Johnson County within eight months, and to the town of Olathe within five months, from date, the bonds to be issued, and placed in the hands of a depositary, to be delivered upon the performance of the agreement.

A completion of the road at an earlier period than was required (no time being specified in the original proposition), and at a probable increase of expense, seems to afford a good consideration for any lawful agreement on the part of the county. We fail to discern the force of this objection, or of the point connected with it, that the stock became thereby cancelled. The commissioners had authority to sell the stock, Compiled Laws of Kansas, 1862, 409; and, unless prohibited by law, an incorporation may become the holder of a portion of its own shares. *City Bank* v. *Bruce*, 17 N. Y. 507.

We do not regard the circumstance that the road was located and built a fraction of a mile distant from the town of Olathe as of any importance. It was a practical compliance with the requisition in that respect, and was accepted and received by the county as a satisfactory performance of the contract. The bonds were issued after the location, and the interest was paid from time to time without objection or complaint in that re-

spect. It is too late now to set up an objection which is an evident afterthought.

It is contended, further, that there is no *bona fide* holding of these bonds, and that all defences may have their full effect in this case.

"The court below finds that the plaintiff Thayer had notice of all the facts and circumstances connected with the issue of these bonds by Johnson County, and of the agreement of June 19, 1868, and of the facts with regard to the assessment of the stock by the railroad company and of its non-payment, and of the issue of stock as a bonus to the purchasers of the bonds of the railroad company, and of the facts with regard to the completion of the road to the town of Olathe; but his co-trustees had no such notice, nor did the purchasers of the first mortgage bonds have such notice, except so far as they are charged with constructive notice by reason of the knowledge of Thayer, one of the trustees."

It is a part of the case, that, on the first day of January, 1869, the railroad company executed to Nathaniel Thayer, F. W. Palfrey, and George W. Weld, the plaintiffs in this suit, a deed of trust conveying a large quantity of lands, and transferring, among other things, its subscriptions from towns and counties, including that now in suit, to secure the payment of $5,000,000 of its negotiable bonds to be issued by the said company, as therein particularly described; that, before the coupons now sued upon had become payable, the railroad company had issued those bonds, which are now outstanding and unpaid to the full amount thereof.

The question then arises, whether notice to one of the trustees in this deed of trust is notice to the holders of the mortgage bonds in such manner that, in a suit by the trustees to enforce payment of the county bonds, the character of a *bona fide* holder without notice is lost.

In *Curtis and Others* v. *Leavitt*, 15 N. Y. 194, the court say: —

"If Graham, one of the trustees, was chargeable, as director of the company, with knowledge that there had been no previous resolution, notice to him was not notice to his *cestuis que trust*. He did not stand to them in the relation of an agent. He was selected and appointed as a trustee by the company, not by the *cestuis que trust*

His powers and duties were prescribed by the company, not by the bondholders. There were, at the time of the execution of the trust-deeds, no bondholders, no *cestuis que trust*. It is a necessary attribute of an agency that it should be created by the principal. . . . In this case, as the relation of principal and agent did not exist between the bondholders and Graham, notice to him, or knowledge by him, that there was no previous resolution, was not constructive notice to the bondholders."

And, again, on the page following, it is said: —

"The trustees are not to be regarded as the agents of the purchasers of the bonds and mortgages assigned to them. No consideration proceeds from them. They were mere assignees of those securities, coupled with no interest, in trust to hold them as security for the payment of all the mortgage bonds that should thereafter be sold or negotiated by the company. . . . Whoever purchased the mortgage bonds became purchasers of the bonds and mortgages so assigned as security for their payment, or of an equitable right to hold them as such security."

We think this is sound doctrine, and that it establishes the proposition that notice to Thayer did not operate to destroy the *bona fide* holding of the bondholders under the deed of trust in which he was named as one of the trustees.

We have noticed all of the objections which we deem of importance, and are of the opinion, upon the whole case, that the judgment should be affirmed; and it is *So ordered.*

BOYD v. ALABAMA.

The defendant, having been indicted under a statute of Alabama for setting up and carrying on a lottery without legislative authority, claimed in defence a right to set up and carry on the lottery in question under a subsequent statute passed on the 10th of October, 1868: this latter statute was repealed in March, 1871. It was admitted on the trial that the acts charged against the defendant were done under that statute, and would be legal if the statute were constitutional, and had not been repealed. That statute required the defendant, and certain other parties associated with him, before exercising the right claimed, to deposit in the treasury of the State, to the credit of the school fund, and for educational purposes, $2,000, and annually thereafter the same sum for twenty years, or so long as they might do business under the act; and that sum had been deposited. Under a previous indictment against the same defendant for a similar offence, the Supreme Court of the State had held

that the statute in question constituted a contract, and that the repealing act was, for that reason, void. In that case, the only matter before the court was the meaning of the statute: its constitutionality was not called in question. On the trial of the case at bar, the defendant relied upon that decision of the court, but he was, nevertheless, convicted and sentenced. On appeal to the Supreme Court of the State, the judgment was affirmed, the court deciding that the statute of Oct. 10, 1868, was unconstitutional. *Held*, that the previous adjudication of the court upon the meaning of the statute — that it constituted a contract between the defendant and the State — did not estop the State from denying its constitutionality in the present case, nor conclude the court upon that question, although the point might have been raised and determined in the first instance.

ERROR to the Supreme Court of the State of Alabama.

Mr. S. F. Rice for the plaintiff in error.

Mr. John T. Morgan and *Mr. P. Phillips* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 10th of October, 1868, the legislature of the State of Alabama passed an act, entitled "An Act to establish a mutual aid association, and to raise funds for the common-school system of Alabama." The act had a very fair and promising appearance, and to the casual reader would seem designed to promote the cause of science and art, advance education, and diffuse knowledge. Certain persons named in the act, and their associates, were given the right to form themselves into a partnership association for the distribution of books, paintings, works of art, scientific instruments and apparatus, lands and tenements, stock and currency, and such other valuables as should promote the object of the association; the distribution to be made by awards and prizes, under such rules and regulations as the parties might adopt, and in such places as they might select. The parties were also authorized to receive subscriptions and to sell certificates of subscription, which should entitle the holders to such articles as might be awarded to them, or their equivalent in currency; the distribution to be made in public, after due advertisement, by lot, chance, or otherwise, according to the rules and regulations established. And it was made the duty of the parties to offer premiums and prizes to the citizens of Alabama "for the best essays in science and art, and the most deserving works of art, and the most useful inventions in the mechan-

ical sciences." And before commencing business under the act, that is to say, before entering upon the career of public benefactions thus conspicuously set forth, the parties were required to deposit in the treasury of the State, to the credit of the school fund, and for educational purposes, $2,000, and annually thereafter the same sum for twenty years, or so long as they might do business under the act.

Nothing could seem to be of greater public utility than the objects contemplated by the enactment; yet, under its general and comprehensive language, license is claimed to set up and carry on lotteries for money, and to sell tickets in such lotteries; and it does not appear that any other use has ever been made of the right or privilege granted. None of the many objects mentioned, except currency, have been offered for distribution. This act was repealed in March, 1871. Before it was passed, there was a statute of the State prohibiting lotteries and imposing a fine, on conviction, of not less than $100 nor more than $2,000, upon any person setting up or carrying on a lottery, or concerned in setting up or carrying it on, without legislative authority. That statute remains unrepealed. Under this statute the defendant was indicted in the city court of Mobile for setting up and carrying on a lottery without legislative authority, and was convicted and sentenced to pay a fine of $1,000. On appeal to the Supreme Court of the State the judgment was affirmed. Revised Code of Alabama, sect. 3,616.

On the trial, the defendant admitted that he had been engaged in setting up and carrying on a lottery in the city of Mobile within twelve months before the finding of the indictment, but claimed a license for that purpose under the statute of 1868, he being one of the persons named therein. And the State admitted that the defendant had paid the money required by the statute of 1868 into the treasury in November of the previous year, and that the acts with which he was charged were done under that statute, and would be legal if the statute were constitutional, and it were not subsequently repealed.

The questions thus presented for our consideration relate to the constitutionality of the act of 1868, and the effect upon the right or privilege there conferred of the repealing act of 1871. The defendant contends that the right or privilege to set up

and carry on lotteries in the State, conferred by the act, rests on a contract of the State, a consideration being given for its grant by the prescribed yearly payment into the treasury, and that the repealing act cannot, therefore, impair it. In consequence of a previous adjudication of the Supreme Court of the State, construing the act as creating a contract with the persons therein named, the defendant further contends that the State is estopped from denying its constitutionality.

It is true, that, in a former case against the same defendant, upon an indictment of a similar kind, for a previous offence of setting up and carrying on a lottery, the Supreme Court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void. But in that case the only subject before the court was the meaning of the statute, — whether its provisions in their terms amounted to a contract which a subsequent enactment could not impair. The constitutionality of the act was not drawn in question; that was not denied.

Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court, upon the constitutionality of the acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the act of 1868, the court was not precluded by the previous decisions from freely considering and determining it. Having considered it, the court came to the conclusion that the act could not be sustained. It appears that the Constitution of the State declares that "each law shall contain but one subject, which shall be clearly expressed in its title." The object of this provision, said the court, was to prevent abuses which had grown up, to

the scandal of legislative bodies; and, using the language of a previous decision, to prevent deception, by including in a bill matters incongruous with the title. Whilst observing that it was necessary to be careful in the application of the doctrine, so as not to cripple and embarrass legislation, and expressing doubts whether the act authorizes a lottery for money, the court said: "But, granting that this right to set up and carry on a lottery is conferred in the body of the statute, it is not expressed in the title. Never was language employed less apt to convey to the mind, learned or unlearned, the idea that the partnership association, the mutual aid society, was to be an undisguised lottery, and that the encouragement of letters, the promotion of science and the arts, which it proposed, was the uncertain prize in currency which might fall to the ticket-holder;" and, because the object is not thus expressed, the act was declared to be unconstitutional. We cannot refuse to give effect to that decision. It is the province of the Supreme Court of the State to construe its own Constitution and laws; and, when it decides that one of its laws is not authorized by its Constitution, it is not for us to deny the correctness of the decision, when there is no evasion in this way of Federal authority.

The act of 1868 being unconstitutional, the contention of the defendant, that it constitutes a contract, repealable or irrepealable, falls to the ground; and he is left to meet the indictment, founded upon a statute confessedly constitutional, in the best way he can. If he has been misled by previous adjudications of the State courts, his relief from the present judgment must be sought from the clemency of the Executive. This court can afford him none.

These views dispose of the case, and require an affirmance of the judgment; but, before closing this opinion, it is proper to make one or two observations, to prevent misconstruction.

1st, While the State has seen proper, through its prosecuting officer, to admit that if the statute of 1868 were constitutional, and had not been repealed, the acts charged against the defendant would be legal, we do not wish to be considered as adopting this conclusion, because we have not called it in question. The observations of the learned justice, who gave the opinion of the Supreme Court of the State, strikes us as worthy of serious

consideration; and he says, after commenting upon the facts, that it is questionable whether the court could affirm that the statute, even if there were no doubt of its constitutionality, authorized the setting up of the lottery in this case; and,

2d, We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals. See *Moore* v. *The State*, 48 Miss. 147; *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 663. *Judgment affirmed.*

LOWE *v.* WILLIAMS.

A suit pending in an appellate State court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States.

ERROR to the Supreme Court of the State of Nebraska.

Williams, a citizen of Iowa, brought suit, June 9, 1869, in the District Court of the second judicial district of Nebraska, against Lowe, a citizen of the latter State, and obtained judgment Aug. 4, 1874, for $7,532.42. Lowe thereupon appealed to the Supreme Court, and, on the 14th of August, 1875, filed his petition in the latter court for the removal of the cause to the Circuit Court of the United States for the district of Nebraska. The prayer of the petition was rejected, and the court, March 30, 1876, rendered final judgment.

Lowe thereupon sued out this writ of error.

So much of the act of March 3, 1875, 18 Stat. 470, as applies to the question of the right of removal, is as follows: —

"SECT. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of differ-

ent States, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. . . .

"SECT. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending." . . .

Mr. W. R. Steele moved to dismiss the writ of error, and united with it a motion to affirm the judgment of the Supreme Court of the State of Nebraska.

Mr. Montgomery Blair, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The act of March 2, 1867, 14 Stat. 558, provided for the removal of causes from the State courts to the circuit courts, under certain circumstances, when due application was made "before the final hearing or trial of the suit." This we held in *Stevenson* v. *Williams*, 19 Wall. 575, to mean "before final judgment in the court of original jurisdiction where the suit is brought." To the same effect are *Vannever* v. *Bryant*, 21 id. 43, and *Fashnacht* v. *Frank*, 23 id. 419, decided since. The act of March 3, 1875, 18 Stat. 471, under which the removal was attempted in this case, requires the petition to be filed "before the final trial." The decisions under the act of 1867 are, therefore, equally applicable to that of 1875. The petition for removal was filed in the appellate court, and, of course, long after the final judgment in the court of original jurisdiction.

Under these circumstances, we consider that, while a Federal question is presented by the record, it is one that has already been settled, and needs no further argument.

The motion to dismiss denied; that to affirm granted.

CRIM v. HANDLEY.

1. The court affirms the doctrine announced in *Hendrickson* v. *Hinckley*, 17 How. 443, that a court of equity will not enjoin a judgment at law, unless the proof clearly shows that the defendant had a just defence, of which he could not avail himself at law, or to which, if available, he was prevented from resorting, by fraud or unavoidable accident, unmixed with any fault or neglligence in himself or his agents.
2. Absence of one of the counsel employed to conduct his defence in a suit at law does not furnish ground for equitable relief, where it appears that the defendant, had he been present at the trial, might have employed other counsel equally competent; nor does the fact that a witness upon whom he relied was so sick during his examination as to impair his recollection of facts within his knowledge. Having failed to ask a postponement or a continuance, he cannot go into equity and claim to have the judgment enjoined.
3. Nor will such relief be granted because the record of a prior suit upon which the defendant relied was lost, or could not be found by the clerk of the court. The loss of the record, and an unsuccessful search for it, presented a good cause for a continuance. Proof of its contents was also available under such circumstances as secondary evidence.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Handley, on the 14th of April, 1873, brought suit in the Circuit Court of the United States for the Southern District of Georgia against Crim and Peeples, surviving partners of King, Crim, & Co., on four promissory notes, executed by the firm to Buffington & Co.

The defence was payment. Peeples also pleaded his discharge in bankruptcy.

When the case was called, no motion was made for a continuance. The evidence offered by the defendants was admitted at the trial without objection, no charge to the jury was asked, and there is, consequently, no bill of exceptions.

The defendants offered in evidence sundry receipts showing payments.

Harper, the attorney in whose hands Buffington & Co. had placed these notes, and Crim and Peeples, the defendants, were witnesses, and testified as to the alleged payments.

Upon this evidence the case was submitted, and it resulted in a verdict and a judgment for $3,154.21 against Crim. Peeples was discharged, on the plea of bankruptcy.

Crim then moved for a new trial, on grounds which do not

appear. The motion was denied. He then filed his bill for an injunction and a new trial, all the allegations of which, in support of the relief prayed for, were fully answered and denied; and the case was heard in August, 1873, when the injunction was denied. No decision was made on the demurrer, which was also filed, but the bill was retained, for the purpose of being heard at the next term.

Testimony was taken by Crim to sustain his allegation that the notes had been paid, and the principal witnesses were again he, Peeples, and Harper.

The chief grounds relied on by Crim for the intervention of equity were, first, that a certain record in a proceeding on the equity side of one of the State courts, alleged to have an important bearing on the question of payment, could not be found by the clerk of that court up to the time of trial; second, that Peeples, when testifying in the common-law case, was not in a condition of mind to tell all he knew and to speak truly. In support of this latter ground, Peeples swears that, two or three days before the trial, he had been seriously ill; had not slept scarcely any for three nights; had taken opium freely; and at the time he testified was in such bad condition that he could not remember the facts in the case. He swears that in another trial he will testify to sundry payments amounting to $3,251.

Upon a final hearing the bill was dismissed, and Crim appealed to this court.

Mr. R. F. Lyon for the appellant.

Mr. Philip Phillips and *Mr. W. H. Phillips* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Courts of equity will not enjoin judgments at law, unless the complainant has an equitable defence to the cause of action of which he could not avail himself at law, because it did not amount to a legal defence; or where he had a good defence at law, of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or his agents. *Hendrickson* v. *Hinckley*, 17 How. 443.

Where a party has failed to make a proper defence through negligence, a court of equity will not enjoin the judgment; but where it appears that such a defence has been prevented by

fraud or accident, without fault of the losing party, a court of equity may grant relief, if the proofs are satisfactory. *Hungerford* v. *Sigerson*, 20 id. 161.

Sufficient appears to show that goods of great value were owned by the mercantile firm of J. W. Buffington & Co., and that they, on the first day of February, 1866, sold the same to the firm of King, Crim, & Co., William Peeples, one of the old firm, entering into the new firm which made the purchase. Payment of the price was made at the time of the purchase, less $4,591.64, for which the purchasing firm gave to the vendors four promissory notes, payable to the creditor firm or bearer, on the first days of April, May, June, and July next ensuing, with interest. Debts of the old firm were still outstanding, for which Peeples, of the new firm, was liable; and for his security the four notes given by the new firm were deposited in the hands of a third person, with the understanding that the depositary was to hold the notes for that purpose, so that, when the debts of the old firm were presented, they might be paid by Peeples or the new firm, and in that event the amounts paid were to be credited on the notes in the hands of the depositary.

Subsisting liabilities of the old firm were presented for payment, and were paid by Peeples, of the new firm; but the record shows that controversy arose respecting the same, and that the depositary of the notes refused to allow the credits to be made on the notes, pursuant to the original understanding. Instead of that, he caused one of the notes to be put in suit to enforce payment of the same. Pending that suit, the new firm brought a bill in equity against the depositary and the old firm, to compel the respondents to carry the understanding into effect. What they prayed was, that the payments thus made should be indorsed on those notes, and they also claimed a credit for worthless cotton-seed sold to them when they purchased the stock of goods of the old firm.

Litigation ensued; but, in the view taken of the case, it will not be necessary to enter very fully into those details. Suits of garnishment were also instituted in behalf of the creditors of the old firm against the depositary of the notes; and during their pendency the notes were placed in the hands of certain attorneys, with directions that the notes be put in suit in the

name of the agent of the creditors prosecuting the suits of garnishment. Pursuant to those directions, the agent, James M. Handley, on the 14th of April, 1873, sued the appellant and Peeples, as surviving partners of the new firm which gave the notes, counting on those notes as indorsee against the makers.

Service was made; and the defendants appeared and set up the following defences: 1. That they never promised. 2. Payment before the suit was instituted. 3. Payment to the payees, and due notice to the indorsee and holder. 4. That the notes were given for a stock of goods, part of which consisted of a lot of cotton-seed warranted sound, which proved to be unsound and worthless. 5. Prior recovery against the defendants to the extent of their liability in the garnishment suits, and the full payment of the amount so recovered. 6. Subsequent sale of the stock of goods to another firm for an amount greatly in excess of what was due on the notes, the purchasers, with the consent of the firm, agreeing to assume and pay what was unpaid on those notes.

Peeples also filed a separate plea, in which he alleged that he had previously been adjudged a bankrupt by the District Court.

Taken as a whole, it must be admitted that the pleadings fully and clearly present every matter in issue between the parties. Both parties appeared on a subsequent day, and they went to trial, the record showing that the verdict as against the appellant was for the plaintiff in the sum of $3,154.21, and in favor of the other defendant, under his plea that he had been duly adjudged a bankrupt. Judgment was accordingly rendered for the plaintiff, and the present appellant filed a motion for new trial. Before the motion came to a hearing, the defendant, with the consent of the plaintiff, filed a statement of the evidence introduced in the case, which was also approved by the presiding justice, as exhibited in the record.

Enough appears in that statement to show that evidence was introduced in support of all the issues presented in the pleadings, and that the error, if any, must have been committed by the jury. For aught that appears to the contrary, it must be assumed that all the evidence offered by the defendant was admitted; and the record does not show that any evidence offered by the plaintiff was admitted to which the defendant

objected. Nothing appears to show any irregularity in the trial; and neither party filed any exceptions to the charge of the court, or to any ruling of the court, in refusing to instruct the jury as requested.

Viewed in the light of these suggestions, it is clear that the record furnishes no ground whatever to suppose that the defendant did not enjoy every right which belongs to a litigant party, without diminution or restriction. Where no exceptions are taken during the trial, the presumption must be that the rulings of the court were correct; and that presumption in this case is confirmed by the fact that no complaint in that regard is made in the statement filed as the foundation of the motion for new trial. By the allegations of the bill of complaint, it appears that such a motion was made and denied before the present bill of complaint was filed, which purports to seek relief for the complainant upon grounds "above and beyond what was considered by the court of law in the former motion."

Prefaced by that statement, the complainant proceeds to state the grounds for the relief, which, as he alleges, exist to support the present application for an injunction and new trial. Briefly stated, they are as follows: 1. That the verdict of the jury is unjust and inequitable, for the reasons that the credits which he claimed were not allowed. 2. That he was misled at the trial and his defence "demoralized" by the failure of recollection on the part of his principal witness, who knew all the facts required to establish the same; that, when the witness was called to testify, he became confused, and that his recollection deserted him to such an extent that he did not know to what he was testifying; that the forgetfulness and confusion of the witness arose, as the complainant is advised, from severe pain and the effect of opiates previously taken to relieve the painful disease with which he was afflicted; and that the consequent inability of the witness to testify to the facts within his knowledge was a complete surprise to the complainant and his counsel. 3. That one of his counsel unexpectedly failed to be present at the trial. 4. That he was unable to procure, as evidence on the trial of the case, the pleadings, proceedings, and decree in an equity suit previously heard and determined

in the State court, which were material to his defence, and for which he made diligent search without success.

Certain other grounds of relief are also alleged in the bill of complaint, which need not be reproduced, as they do not appear to give much additional weight to the application.

Two of the respondents appeared and filed separate answers. Most or all of the material matters alleged in the bill of complaint are denied in the answers, which renders it unnecessary to enter into any preliminary comparison of the allegations of the former with those of the latter.

Credits to considerable extent must have been allowed, as is obvious from a comparison of the verdict with the aggregate amount of the notes and interest. More was claimed by the defendants than was allowed, and all experience shows that a losing party is seldom satisfied when his demand or set-off is reduced by the tribunal appointed to determine its amount.

Parties in suits at common law, where the value in controversy exceeds $20, are entitled to a trial by jury; but the same amendment to the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. Two modes only were known to the common law for the examination of facts once tried by a jury; to wit, the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* from the appellate court for some error of law in the proceedings. *Parsons* v. *Bedford*, 8 Pet. 448; 2 Story, Const. (3d ed.) 584; *Insurance Company* v. *Comstock*, 16 Wall. 269.

All suits not of equity or admiralty cognizance are embraced in that provision, and subject to its control. By its terms it is applicable only to common-law suits, and, of course, does not conflict with the rule before stated, that courts of equity may exercise jurisdiction to enjoin a judgment or to grant the injured party a new trial, in a case where the proof is clear, to show that it would be inequitable and against conscience to execute it; as where it appears that the injured party has an equitable defence of which he could not avail himself in the suit at law, or if it appears that the defence could be made at law, but that he was prevented from making it by fraud or

unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Truly* v. *Wanzer*, 5 How. 142; 2 Story, Eq. (9th ed.) sect. 887.

Difficulty would attend any attempt to prescribe a rule which will apply in all cases; but it is safe to affirm that equity may exercise jurisdiction in such a case, where the evidence clearly shows that it would be against conscience to execute the judgment, because the injured party had a just defence of which he could not avail himself in the suit at law, or of which he might have availed himself at law, but was prevented from so doing by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Insurance Company* v. *Hodgson*, 7 Cranch, 336.

On the other hand, said Marshall, C. J., it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court that the defence in the suit at law ought to have been sustained. *Walker* v. *Robbins*, 14 How. 585; *Creak* v. *Sims*, 5 id. 204; *Sample* v. *Barnes*, 14 id. 73.

Where, pending a suit in the Circuit Court against a surety, judgment was recovered against him in a State court for the same cause of action, and he paid the whole amount before judgment was rendered in the Circuit Court, the judgment rendered in the Circuit Court was properly enjoined, it appearing that the surety tendered the defence of antecedent payment *puis darrein continuance*, and that the court refused to admit the defence. *Leggett* v. *Humphreys*, 21 How. 71; *Humphreys* v. *Leggett*, 9 id. 313.

Frequent applications to enjoin judgments were made in equity, before the practice of awarding new trials was introduced into the courts of common law. Until the practice of granting new trials in courts of law was introduced, every reason existed why equitable relief should be afforded; but as the courts of law now exercise that power very liberally, especially in case of fraud or unavoidable accident, a resort to equity is seldom necessary or successful. 3 Lead. Cas. (3d ed.) 190; *Railroad* v. *Neal*, 1 Wood's C. C. 353.

Relief in equity may be granted in case of fraud or collusion

but it will not be granted in other cases, unless it clearly appears that to allow the judgment to be executed would be contrary to equity and good conscience, and that the facts which render it inequitable were unavailable as a defence in the action in which the judgment was recovered, without any fault or negligence of the losing party. *Clute* v. *Potter*, 37 Barb. 199; *Burton* v. *Wiley*, 26 Vt. 432; *Carrington* v. *Holabird*, 17 Conn. 537; Kerr on Inj. 22; *Simpson* v. *Hart*, 1 Johns. Ch. 98.

Absence of one of the counsel employed by the party furnishes no ground for equitable relief in this case, in view of the circumstances, as it does not appear that the party, if he had been present, might not have employed another equally competent to conduct the defence. Nor does the allegation that one of his witnesses was sick during the examination, that it impaired his recollection and rendered him incapable of stating material facts within his knowledge, afford any sufficient support to the present application. Accidents of the kind occasionally occur in the course of trial; but the plain remedy for such an embarrassment is an application to the court to postpone the trial or to continue the case, as the circumstances may require. Applications of the kind, if well founded, are seldom or never refused; but if a party elects to proceed and take his chance of success, he cannot, if the verdict and judgment are against him, go into equity, and claim to have the judgment enjoined. If a witness is too unwell to testify understandingly, the proper remedy for the party is to move for a postponement of the trial; and, if he elects to proceed and is unsuccessful, his only remedy is a motion for new trial to the court where the accident occurred.

Suppose that is so, still it is insisted by the complainant that the allegations of the bill of complaint, that he was unable to procure an exemplified copy of the record in the prior described suit, if sustained by proof, are adequate to show that the judgment here in question should be enjoined; but there are two answers to that proposition, either of which is sufficient to show that the proposition is not well founded: 1. Because the loss of the record and the inability of the clerk to find it were a good cause for a continuance, if duly presented and supported by an affidavit in due form. 2. Because it was a case where

secondary evidence was properly admissible, the party first proving loss and due unsuccessful search.

Nor is it any proper answer to that suggestion to say that the counsel present could not prove the contents of the record. Both the counsel and party knew at the commencement of the suit that the record in question would be material evidence for the defendant; and, if his counsel was unable to testify as to its contents, the defendant should have attended the trial himself, or have summoned the clerk, or some other person having the requisite knowledge. Accidents of the kind usually find a remedy in an application to the discretion of the court for a postponement of the case, or parol proof of contents, or, in case the trial proceeds and a verdict follows, by a motion for new trial at common law.

Due proof of loss, unsuccessful search, and proof of contents, would have been as available for the defendant as an exemplified copy of the record; and, in the absence of any proof of proper diligence in that regard, it is clear that he shows no ground whatever for equitable interference in his behalf.

Suffice it to say, without remarking upon the other causes assigned why relief should be granted, that they must all be overruled, for some one or more of the reasons given for overruling those already specifically named. *Decree affirmed.*

COUNTY OF DALLAS v. MACKENZIE.

1. Under the Code of Practice of Missouri, if any one of the defences set up in the answer is a bar to the plaintiff's right to recover, a demurrer to the whole answer must be overruled.
2. A county in Missouri, sued on certain coupons attached to bonds alleged to have been issued by it, denied in its answer the plaintiff's ownership for value; and, for a further defence, averred that no orders authorizing the issue of such bonds were ever made by the proper county court, but that two of the justices thereof fraudulently and corruptly, but not as a court, made a certain other order, upon conditions which were not complied with. It further averred that such bonds were fraudulently and corruptly issued, and without authority. No copy of the bonds was filed with the plaintiff's complaint. The plaintiff demurred to the answer. *Held*, that the demurrer must be overruled.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This is an action brought by the defendant in error to recover on certain coupons attached to bonds alleged by him to have been issued by the county of Dallas, in the State of Missouri. The pleadings upon which the question of law decided by this court arose are set forth in the opinion.

Mr. William Patrick for the plaintiff in error.

Mr. T. C. Fletcher, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

This case comes before the court upon a demurrer to the answer.

In his complaint, the plaintiff alleged that the defendant issued certain bonds, by which it promised to pay to the Laclede and Fort Scott Railroad Company the sums named, pursuant to an order of the county court; that the bonds recited that they were issued pursuant to an order of the county court of Dallas County, made on the 18th of May, 1871, and amended on the nineteenth day of June and the twelfth day of August, of the same year, by authority granted in the charter of said company, by an act approved Jan. 11, 1860; that he is the owner for value and the bearer of certain coupons attached to said bonds, and entitled to recover the amount thereof, by reason of which he avers an indebtedness to him in the sum of $3,800 with interest from the various dates mentioned.

To this the defendant answers, denying that it promised to pay the bonds as in the complaint is alleged, denying that by its writings or coupons it promised to pay the different sums therein specifically set forth, and denying that the plaintiff was the owner for value of the coupons sued for.

The answer, for a further defence, avers that the bonds referred to recite that they were issued pursuant to certain orders of the county court of Dallas County (which are of the dates specified in the complaint), and avers that no orders authorizing the issue of such bonds were ever made by the said county court as so recited, but that two of the justices of said court, fraudulently and corruptly, but not as a court, made a certain other order set forth, but upon conditions which were not com-

plied with. It is further averred that said bonds were fraudulently and corruptly issued, and without authority, and that at the date of said issue the annual assessment of the county of Dallas was less than $1,500,000, and the county had already subscribed to the capital of said railroad the sum of $150,000.

To this answer the plaintiff demurred, upon the following grounds: —

1. That it did not state facts sufficient to constitute a defence.

2. That its admissions were sufficient to entitle plaintiff to recover.

3. That its denials were inconsistent with its admissions.

4. That it was not necessary to file the bonds, the coupons being filed in the court.

5. That plaintiff being the bearer of the coupons is sufficient, and ownership being immaterial.

6. That the authority of the court to issue the bonds under the special law incorporating the Laclede and Fort Scott Railroad Company is not denied.

7. That it admits their issue, and does not deny the authority to issue them, recited in them.

8. The bonds on their face import a compliance with the law, and defendant is estopped from denying the regularity of such compliance.

9. It does not charge plaintiff with knowledge of any of the alleged frauds in the issue of the bonds.

The demurrer was sustained, and judgment rendered for the plaintiff. The defendant thereupon sued out this writ of error.

The demurrer is general to the whole answer. The answer is interposed under a system of pleading which allows numerous and inconsistent defences. If, therefore, the answer contains any good defence, the demurrer must be overruled.

The complaint gives no copy of the bonds. It simply says that they were issued to a railroad company named, and that they recited that they were issued pursuant to an order of the county court of Dallas County, made on the eighteenth day of May, 1871, and amended on the nineteenth day of June and on the 12th of August, of the same year, and that this was by authority granted in the charter of the railroad mentioned.

In this statement are involved two fundamental propositions: 1st, That the charter of the company gave authority to the county to subscribe; and, 2d, that the county exercised that authority. Both of these averments are jurisdictional, and if either does not exist, no bonds can legally issue. The first is a question of law to be ascertained by a reference to the statute. The second is a matter of fact to be determined upon the pleadings or the proofs. "It shall be lawful for the county court of any county in the State to subscribe to the capital stock of said company." Acts of Mo., 1859, 1860, p. 434, sect. 14. This is not a self-executing power. It is an authority to the county, and, until affirmatively acted upon, possesses no more force than if it did not exist. The defendant in its answer denies that this authority was exercised by the county at the dates mentioned, or at any time. We think the plaintiff erred in demurring to the answer and thus admitting that the county court had never exercised its power. *Smith* v. *Sac County*, 11 Wall. 139.

The plaintiff's case is not aided by the allegation that he is a holder for value of the coupons. A holder for value is not affected by any irregularities or frauds or unfounded assumption of authority on the part of the agents of the town or county. But good faith is unavailing where there is an entire want of authority in those who profess to act. If A. forge the name of B. to a promissory note, or without any authority A. sign a note as his agent, and there be no ratification, no amount of good faith in the holder will enable him to recover upon it. Good faith to the person who does not authorize the use of his name requires that he should be protected against a holder who pays his money for a forged or unauthorized note.

And again, the answer expressly denies that the plaintiff is a holder for value of the coupons. The language is, that it "denies that plaintiff was at the institution of this action, or now is, the owner for value of any of the bonds or coupons in said petition declared on." Instead of meeting this allegation by an issue of fact, the plaintiff by demurring admits its truth; and we do not see how, upon the pleadings, he can be deemed a holder for value. There are other questions in the case, on which we do not think it necessary to pass.

The judgment must be reversed, and the cause remanded to the Circuit Court with directions to enter judgment upon the demurrer for the defendant below, unless the plaintiff below shall withdraw his demurrer and proceed to trial, within such time and upon such terms as the Circuit Court may direct; and it is *So ordered.*

GUNN v. PLANT.

1. In Georgia, the omission to record the verdict upon which the judgment was rendered does not deprive the plaintiff of his lien upon the real estate of the defendant.
2. A judgment duly entered by a court having jurisdiction of the parties, and of the subject-matter in controversy, is, notwithstanding irregularities in matters of form, binding, until set aside or reversed.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

This is a bill in equity, filed Jan. 12, 1872, by I. C. Plant & Son, against Joseph E. Murray, trustee in bankruptcy of James H. Woolfolk, bankrupt, and Daniel F. Gunn, guardian, to restrain Murray, the trustee, from applying money in his hands arising from the sale of certain lands of the bankrupt to the payment of a judgment in favor of Gunn, and asking that a debt in their favor, secured by a mortgage upon the lands sold, and for which they had obtained a decree of foreclosure and sale at the October Term, 1869, of the Jones County Superior Court, be paid in preference. The bill also asks, that, if the judgment of Gunn is found to be valid, and a lien upon the property superior to their mortgage, he may be compelled to exhaust other lands bound for the payment of the judgment before resorting to the fund.

The bill, after stating the mortgage to the complainants, bearing date Dec. 7, 1868, and the sale of the property by the trustee, proceeds as follows: —

"And your orators state that the said Daniel F. Gunn, guardian, claims that the moneys . . . should be applied toward the payment of a judgment obtained by him at the November Term, 1866, of the

Superior Court of Bibb County, in said State, for the principal sum of $11,212.38, against Thomas J. Woolfolk and James H. Woolfolk, as principals, and John W. Woolfolk, as surety. Your orators further state that said judgment in favor of said Gunn, guardian, was entered on what purports to be a verdict rendered by a jury at the term of the court at which said judgment was entered as aforesaid, but which alleged verdict was not entered on the minutes of that court at the said term, as your orators are advised and believe; nor was the same entered on the minutes of the court at all until the April Term, 1871, of said court, when it was ordered to be entered, *nunc pro tunc*, on the minutes thereof, to which order a bill of exceptions was filed, and is now pending in the Supreme Court of the State."

And among the interrogatories which the defendants were required to answer was one as follows: —

"Whether the judgment of said Gunn, guardian as aforesaid, was not entered on what purports to be a verdict which was not entered on the minutes of the court until the April Term, 1871, thereof, and whether a bill of exceptions is not now pending for allowing it to be then entered on the minutes."

The answer of Gunn states that, "at the November Term, 1866, a verdict was regularly rendered, by a jury empanelled and sworn in the case on the original declaration filed therein, and signed by the foreman of the jury, in favor of said Gunn, guardian, against said defendants as aforesaid, for the sum aforesaid, and which verdict was regularly returned into court, and filed in the clerk's office at said term, and entered upon the judge's docket, in the handwriting of the then presiding judge, and, at the same term, a judgment was regularly entered on said verdict; but, afterwards, by omission of the clerk, respondent admits the same was not entered on the minutes of the court, and respondent avers the validity of the verdict was perfect; and respondent admits that, at a subsequent term, to wit, the April Term, 1871, said omission having been discovered, the presiding judge, on motion, ordered said verdict to be entered on the minutes *nunc pro tunc*, and which was accordingly done."

And again, in answer to the interrogatory, he admitted that the judgment "was entered on a verdict, which verdict was

not entered on the minutes of the court until the April Term, 1871, thereof."

Murray, in his answer, says the facts in relation to the judgment are correctly stated in the bill.

The "transcript of the record from Bibb Superior Court" shows a judgment at the November Term, 1866, as follows: —

"Principal, $11,212$\frac{38}{100}$; interest to

"Whereupon, it is considered by the court that the plaintiff do recover of defendants, Thomas J. Woolfolk, James H. Woolfolk, and John W. Woolfolk, the sum of eleven thousand two hundred and twelve (11,212) dollars and thirty-eight cents, for principal debt, and dollars and cents, for interest to , and the sum of dollars and cents, for costs in this behalf expended, and the defendant be in mercy.

"Judgment signed this twenty-first day of November, 1866.

"N. H. BASS, *Plaintiff's Attorney.*"

Upon this judgment an execution was issued, Nov. 28, 1866, upon which are indorsed payments, Dec. 7, 1868, $600; Jan. 20, 1869, $2,200; Feb. 1, 1869, $2,400; Feb. 15, 1869, $1,500.

At the April Term, 1877, the following entries appear upon the minutes: —

"DANIEL F. GUNN
v.
THOS. J. WOOLFOLK, JAMES H. WOOLFOLK, JOHN W. WOOLFOLK, Security.

} Complaint in Bibb Superior Court, May Term, 1866, and verdict to November Term, 1866.

"It appearing to the court that the plaintiff failed to enter his judgment for the interest, as contemplated by the verdict, it is, therefore, ordered, upon motion of plaintiff's counsel, that plaintiff have leave to amend said judgment, so far as the interest is concerned, *nunc pro tunc.*

"JEMISON & NISBET, *Plaintiff's Attorneys.*"

"DANIEL F. GUNN
v.
THOS. J. WOOLFOLK, JAMES H. WOOLFOLK, JOHN W. WOOLFOLK, Security.

} Complaint in Bibb Superior Court, May Term, 1866, and verdict to November Term, 1866.

"It appearing to the court, from the entry upon the bench-docket, and from the original papers of file in the above-stated case,

that a verdict was rendered by the jury at the November Term, 1866, of this court, and that the clerk of this court failed to enter said verdict upon the minutes of the court, upon motion of counsel for plaintiff, it is ordered that said verdict be entered *nunc pro tunc.* "HUNTER, JEMISON, & NISBET,

"*Plaintiff's Attorneys.*"

May 1, 1871, the defendants in the judgment moved the court to set aside the *fi. fa.*, "and the judgment on which it claims to be founded, because the same, or either of the same, is not founded on any legal verdict, or other legal authority, because said *fi. fa.* and judgment are without legal authority, and cannot be found on the minutes of the court." In support of this motion, they filed a paper, in which they stated "that no verdict was ever rendered in the cause, and deny that the entry on the declaration in said case of what purported to be a verdict was in fact the verdict of any jury duly rendered in said case." These objections were overruled, and the following entry then made on the minutes: —

"Whereupon, it is considered by the court that plaintiff do recover of the defendants, T. J. Woolfolk, J. H. Woolfolk, and J. W. Woolfolk, security, in addition to the sum of $11,212 principal, interest on said sum of $11,212.38, from the fourteenth day of April, eighteen hundred and sixty (A.D. 1860), until paid. This judgment for interest to take effect now for then.

"JEMISON & NISBET, *Plaintiff's Attorneys.*"

After the filing of the bill in this case, the Supreme Court, March 12, 1872, entered the following judgment upon the bill of exceptions: —

"THOMAS J. WOOLFOLK *et al.*, Plaintiffs in Error,
v.
DANIEL F. GUNN, Defendant in Error.

"This case came before the court upon a transcript of the record from the Superior Court of Bibb County, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed, provided that the defendant in error shall, upon entering the remitter in his case upon the minutes of the Superior Court, as the judgment thereof, file thereon an agreement that nothing in the judgment allowing these amendments shall

interfere with the rights of the security hereafter to plead any release or discharge of himself which the law may impose, growing out of any damages coming to him from the failure of the plaintiff in the suit to have his verdict entered at the proper time."

Pursuant to this order, Gunn filed the required agreement, and judgment was entered upon the minutes of the Superior Court accordingly.

The Circuit Court having given a decree directing the payment of the mortgage of Plant & Son, in preference to the judgment in favor of Gunn, and ordering that the balance of the fund in the hands of the trustee be distributed by the court in bankruptcy according to the legal priorities of the creditors, Gunn brought the case here by appeal.

Mr. Thomas M. Norwood for the appellant.

Mr. Clifford Anderson, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The facts in this case, as they are presented to us by the pleadings and proof, are as follows: —

In the suit of *Gunn* v. *Woolfolks*, a verdict was rendered in due form by a jury, but, through the omission of the clerk, it was not spread upon the minutes of the court. Notwithstanding this, however, a judgment was regularly entered. That is expressly stated in the bill, and shown by the transcript of the record of the Superior Court. Such a judgment was also recognized by the court as actually existing in due form, when, at the subsequent term, an entry of the verdict upon the minutes, *nunc pro tunc*, was allowed, and a judgment given for the interest. The statement in the answer of Gunn, that "at the same term a judgment was regularly entered upon the verdict," but admitting "that afterwards, by omission of the clerk, the same was not entered on the minutes," while, taken by itself, perhaps implying that the judgment was not entered, was evidently intended to apply only to the verdict; for it is expressly averred that the judgment was regularly entered upon the verdict, and that the only omission complained of was supplied by the subsequent record of the verdict. This, too, is in accordance with the theory of the bill, which is, that, at the time the

mortgage was executed to the complainants, the judgment was not a lien, for want of a verdict appearing on the minutes to support it. The learned circuit judge, who decided the case below, says in his opinion that "the only evidence of any verdict or judgment . . . is in the verdict of the jury indorsed on the declaration, and a judgment for the principal sum due, also written upon the back of the declaration by the plaintiff's attorney, and signed by him;" but there is no such evidence before us. Here the record shows a judgment duly entered, with nothing to indicate that it was only a "memorandum of counsel." Our decision must be upon the case as it comes to us, and not upon what it may have been below.

No question is raised as to the right of Gunn to assert his lien for the interest on his debt, under the amendment to the judgment as entered in April, 1871, because the amount of money in the hands of the trustee is not enough to discharge the balance of principal due. When the second entry was made, the original judgment was not set aside, or amended even, but a new judgment was entered for the interest.

Upon this state of facts, the question presented for our determination is, whether a judgment otherwise duly entered is void, if the verdict on which it was rendered had not been recorded in the minutes; for, if voidable only, it is good until reversed by a direct proceeding for that purpose, and cannot be impeached collaterally.

It is very clear that a decision of a court is not technically a judgment, until in some form it has been entered of record. If entered in the course of judicial proceedings, of which the court has jurisdiction, it is binding until reversed or set aside, no matter how irregular it may be as to matters of form. *Cooper v. Reynolds*, 10 Wall. 316. In this case a judgment was entered in due form. As a judgment, it was complete. There had been a verdict, and that appeared among the files in the cause. It was within the power of the court, therefore, to enter the judgment. The only defect in the proceedings is an omission to properly record the verdict. That seems to us an irregularity only. The court had jurisdiction of the cause and of the parties, and in due course of proceeding had the power to enter the judgment, and did so. This the record shows. A person inter-

ested in the question would, upon application at the clerk's office, have found a judgment recorded in the proper place. In the form it was entered, it was a lien upon the lands of the defendant. This was the essential fact. It matters not that the record also disclosed an irregularity, for which, unless it could be cured, the judgment as recorded might, upon proper application, be set aside; for, until set aside, it continued in force as a subsisting lien.

In this particular the case is different from that of *Administrators of Liger* v. *Rogers*, 12 Ga. 289. There the judgment as entered did not create the lien. The amendment subsequently made was necessary to give it that effect, and between the date of the original entry and the amendment a purchaser without notice had intervened. Here the lien is complete if the judgment stands. The only question is whether it can stand. The amendment to the record is not to give the judgment additional effect, but to sustain the effect it already has. Finding it recorded, a purchaser would be put upon inquiry for the verdict, and such an inquiry would have discovered it on the files. True, it should have been entered on the minutes. That was the duty of the clerk, and, if he fails in this, "the court may at any time have the misprision corrected." *Pearce* v. *Bruce*, 38 id. 451.

We think, too, the case is distinguishable from that of *Lea* v. *Yates*, 40 id. 56. There, in a suit pending, "the counsel for the defendant made the following confession, which was entered on the minutes as made: 'We confess judgment to the plaintiff for the sum of $——, with interest and costs, reserving the right of appeal.' Upon this confession, the counsel for the plaintiff entered up judgment for $224.58 principal, and $4.71 of interest." At a subsequent term of the court an order was passed filling the blank in the confession to correspond with the judgment; but in the mean time the judgment debtor had sold the lands which were the subject-matter of the controversy, and the question was, whether the lien of the judgment took effect as against this purchaser at the date of the original entry, or not until the amendment was made. The court held that it did not take effect until the amendment, and in the opinion uses this language: "Till this amendment was made, we think this judgment had no validity. It rested upon neither the ver-

dict of a jury nor a confession by the defendants for any thing but costs of suit. The amount of principal for which it was rendered had never been agreed upon by the parties; and, as there was no definite sum of principal, there could be no calculation of interest." In that case there was no authority for the judgment, and the record disclosed that fact. Here there was in the files of the cause the evidence of complete authority to render the judgment for all that was given and more. There is no necessity for supplying any defect in the authority as it actually existed. All that is required is to correct a "misprision" of the clerk, and record the verdict as it appeared in the files. It was in writing and signed by the foreman, in accordance with the practice in Georgia. The subsequent entry of the judgment is complete evidence of its acceptance by the court. The case of *Dornick* v. *Reichenback*, 10 S. & R. 90, is not an authority against this position; for in Pennsylvania the practice is, as appears in that case, not to take verdicts in writing, but to receive them "from the lips of the foreman, and record them in the usual way." In Georgia, however, they are delivered in writing, and kept with the files. In this way the evidence of what the verdict actually was can be preserved without an entry on the minutes.

We think, therefore, that, upon the case as it is presented to us, the court erred in deciding that the lien of the mortgage to the complainants was superior to that of the judgment of Gunn. In our opinion the judgment was valid, and a lien upon the property from the time of its rendition at the November Term, 1866.

The Circuit Court did not pass upon the other branch of the case; and, as the facts appearing in the record are not sufficient to enable us to decree affirmative relief in this particular, the decree of the Circuit Court will be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion, as equity and justice may seem to require; and it is

So ordered.

GODDARD v. ORDWAY.

1. Where an appeal has been duly taken, the *supersedeas* which follows from a compliance by the appellant with the act of Congress in that behalf operates to stay the execution of the decree.
2. Where the subject-matter of litigation is the funds in the possession of a receiver, the court below may, notwithstanding the *supersedeas*, give him the requisite orders for their preservation; but it cannot place them beyond the control of a decree that may be made here.
3. Should that court, by mistake or otherwise, proceed to carry its decree into effect, its action may be restrained by the appropriate writ from this court.

APPEAL from the Supreme Court of the District of Columbia.

On motion for a writ of *supersedeas*.

Mr. E. L. Stanton in support of the motion.

Mr. R. T. Merrick and *Mr. George F. Appleby*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in equity prosecuted by the appellant to subject to the payment of a debt a portion of the profits, as they accrued to the defendant in the performance of a contract between himself and the United States. In the progress of the cause in the court below a receiver was appointed to collect from the United States a part of the moneys payable to the defendant under his contract, as they fell due, and retain them to await the result of the suit. Upon the final hearing below the bill was dismissed, and from that decree this appeal, which operates as a *supersedeas*, was taken. When the *supersedeas* was perfected, the receiver had in his hands about $25,000, invested in United States bonds, which he had collected under the order of the court and held subject to its disposal. The appellant fearing, as he alleges, that an order is about to be made, directing the receiver to pay the money in his hands to the defendant, notwithstanding the appeal, asks the interference of this court for his protection.

A *supersedeas* upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be of the

decree below was the collection of the cost and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.

A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the *supersedeas*, we may, under sect. 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be "a writ necessary for the exercise of our jurisdiction." The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise. In this case, a rule has been already entered and served upon the court below and its receiver, restraining them from paying over any portion of the fund to the defendant until the further order of this court. That rule is now in force, and we suppose no further writ will be necessary to give it effect. *Motion denied.*

CASEY *v.* GALLI.

1. When a national banking association is insolvent, the order of the comptroller of the currency, declaring to what extent the individual liability of the stockholders shall be enforced, is conclusive. *Kennedy* v. *Gibson and Others*, 8 Wall. 498, cited and approved.
2. When his order is to collect an amount equal to the full par value of the stock, the suit by the receiver against the stockholder must be at law, and that amount will bear interest from the date of the order.

3. In such a suit the stockholder is estopped from denying the existence or the validity of the corporation.
4. No authority other than that conferred by Congress is required to enable a bank existing under a special or a general State law to become a national banking association. The certificate of the comptroller is conclusive as to the completeness of the organization under the act of Congress in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank.
5. A plea is bad which sets up that the comptroller has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from these claims, there are means enough to meet the just liabilities of the bank.

THIS was an action at law, brought in this court by the receiver of the New Orleans National Banking Association, to enforce the individual liability of the defendant as a stockholder of that institution.

The defendant is a subject of the kingdom of Italy, and its vice-consul at the city of Philadelphia.

By agreement, and in order to present for the consideration of the court several of the grounds of defence, the defendant filed a demurrer to the declaration, and also pleas in abatement, without reference to the order of pleading them, and subject to the future direction of the court in disposing of them. The plaintiff joined in demurrer to the declaration, and demurred to the pleas in abatement, and the defendant joined in demurrer.

The questions thus presented by defendant's demurrer are, —

1. Whether the proceeding to enforce the liability of the defendant should not be in equity and not at law.

2. Whether to sustain the action at law it is sufficient to aver the necessity of enforcing the liability, and that such necessity has been declared by the comptroller of the currency without stating facts from which the court can determine the necessity.

3. Whether the order by the comptroller to collect from each stockholder the entire amount for which he is liable, is conclusive upon the defendant, without the allegation of any facts showing the amount which he is liable to contribute.

The questions raised by the plea in abatement are, —

4. Whether a majority of the directors, with the authority of the owners of two-thirds of the stock of a State bank, can change its organization into that of a national banking associa-

tion without any authority given by the State law in its charter or otherwise to make the change.

5. Whether the certificate of the comptroller is conclusive as to the organization and existence of the association.

The pleadings are set out in the opinion of the court.

Mr. J. D. McPherson for the defendant.

1. The State corporation never became a national bank, notwithstanding the assent of the owners of two-thirds of the stock. No number less than the whole could accept a charter from the United States, nor even then without an enabling act. Green's Brice on Ultra Vires, p. 539, note, and cases cited; *Head* v. *Providence Insurance Co.*, 2 Cranch, 127, 166; *Manufacturers' and Merchants' Bank* v. *Commonwealth*, 72 Penn. 70. See Enabling Acts of Massachusetts, New York, Pennsylvania, Vermont, and other States.

2. The remedy of the plaintiff is in equity. As shareholders "are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted," *Bank* v. *Kennedy*, 17 Wall. 19, 22, and as the assets here have not been exhausted, an account must be taken of debts and assets in order to ascertain the deficiency; and as for such deficiency the shareholders are only "equally and ratably" liable, the ascertainment of the proportion calls for the exercise of equity powers. *Pollard* v. *Bailey*, 20 id. 520.

3. The declaration only avers that the comptroller has determined that shareholders must pay the par value of their stock to pay the debts of the bank. The special plea avers that among the debts so intended to be paid by the comptroller are certain disputed claims, which are not debts of the bank.

Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit either at law, in equity, or in admiralty. *Murray's Lessee* v. *Hoboken Co.*, 18 How. 284.

Whether the claim be a valid demand against the shareholder is in its nature a judicial question, *The Empire Bank*, 18 N. Y. 199, and must be open to contest by the shareholder in a suit to enforce his liability. Id.; *Slee* v. *Bloom*, 20 Johns. (N. Y.) 669. Any amount exacted from him in this suit can never be reclaimed, but must go to the creditor. It

is not assets of the bank. *Dutcher* v. *National Marine Bank*, 12 Blatchf. 435.

Mr. Charles Case, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The declaration avers as follows: On and before the third day of June, 1864, the Bank of New Orleans was a banking corporation organized under the laws of the State of Louisiana, and as such carried on the business of banking until about the first day of July, 1871, when the bank, by due proceedings under the act of Congress, entitled "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, became a national banking association under said act of Congress, and as such took the name and style of the "New Orleans National Banking Association," and carried on the business of banking until the fourth day of October, 1873, when it failed and suspended payment.

Thereupon, the comptroller of the currency, after due proceedings had, appointed a receiver for the association, and it was put in liquidation under the act of Congress before mentioned and the acts amending it, and the plaintiff is such receiver, being lawfully appointed under the said act. By the conversion of the Bank of New Orleans into such banking association every holder of the shares of the capital stock of said Bank of New Orleans became a shareholder of the capital stock of said New Orleans Banking Association to the amount of his shares, and as such subject to the liabilities imposed by said act of Congress on such shareholders. There is owing by the association to its creditors large sums of money. Its assets are insufficient to pay its debts. It has become necessary, in order to pay the debts, to enforce the liability of the shareholders. The comptroller has decided that this shall be done. On the seventh day of June, 1875, by his order in writing, he required the plaintiff, as such receiver, to enforce such liability against each stockholder to the amount of the par value of his stock held at the time of the failure of the association. The capital stock of the association was $600,000, divided into twenty thousand shares of the par value of $30 each.

The defendant is an alien, a subject of the kingdom of Italy, and vice-consul, &c. At the date of the failure of the association he was the owner of fifty shares of the capital stock of the par value of $30 for each share. By reason thereof he is liable to pay the sum of $1,500. He has been specially requested to pay that sum, and has refused to do so. The plaintiff is, therefore, entitled by force of the statute to recover the said sum of $1,500, with interest at the rate of five per cent per annum.

It was agreed by the parties that demurrers, pleas, replications, and other pleadings might be filed without reference to the order in which they were properly pleadable.

The defendant demurred to the declaration, and assigned the following causes: —

1. That the defendant is bound to contribute ratably, and that the proper amount can be ascertained only in equity.

2. That the defendant is bound to contribute ratably to pay a large sum; that this sum is not stated in the declaration, and hence what would be ratable and proper does not appear.

3. That the obligation of the defendant is to pay into the hands of the comptroller of the currency a ratable portion of the debts of the association proved before him, and that the declaration does not show that any debts had been so proved.

4. That the declaration demands a larger sum than the defendant is required by the statute to pay, and also an additional sum by way of interest.

In regard to the first three of these objections, it is sufficient to say that *Kennedy* v. *Gibson and Others*, 8 Wall. 498, is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the comptroller; that his determination cannot be controverted by the stockholders in suits against them; and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then

and those who should pay at the end of a protracted litigation. The defendant filed three pleas in abatement: —

1. *Nul tiel corporation.*

2. That there was not then, nor when the plaintiff was appointed such supposed receiver of said New Orleans Banking Association, nor before nor since that time, any such corporation in existence, because the Bank of New Orleans had no power by its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States; wherefore it was prayed that the declaration be quashed.

3. That there was not then, nor when the plaintiff was appointed such supposed receiver of the New Orleans Banking Association, nor before nor since that time, any such corporation in existence, because the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a national banking association under the laws of the United States, nor to accept an organization certificate as such banking association; wherefore it was prayed that the declaration be quashed.

The plaintiff filed a joint demurrer to all these pleas. At the argument the first plea was abandoned. The other two remain to be considered.

The pleas were properly framed in abatement, and not in bar. *Jones* v. *The Bank of Tennessee*, 8 B. Mon. (Ky.) 122; *Woodson* v. *The Bank of Gallipolis*, 4 id. 203.

The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat. 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally.

The third plea is also bad.

The eighteenth section of the act requires the comptroller to make a careful examination in all cases of original applications, and, if he found the association was "lawfully entitled to commence the business of banking," he was to give a certificate

to that effect; and it is declared that the association "shall transact no business except such as is incidental to its organization, and necessarily preliminary, until authorized by the comptroller of the currency to commence the business of banking." 13 Stat. 101. A like examination and certificate are required by the forty-fourth section, where an existing bank organizes under the act. That section provides "that when the comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges and shall be subject to the same duties, responsibilities, and rules, in all respects, as are provided in this act for associations organized under it." 13 Stat. 118.

The declaration avers that the association became such by due and regular proceedings under the act. The plea denies the regularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the bank did not authorize the directors of said bank to convert it into a national banking association, nor to accept an organization certificate as such banking association. According to the law of pleading, what is not denied is conceded. The giving of the comptroller's certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate, and contradict it. This cannot be done. The comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation.

It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association. No question can be raised in this collateral way as to either.

In *Thacher* v. *The West River National Bank*, 19 Mich. 196, it was held that whether there was any defect in the process of organization was a question for the comptroller to decide, and that "his certificate of compliance with the act of Congress

removes any objection which might otherwise have been made to the evidence upon which he acted."

In this we concur.

There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it. *Eaton et al.* v. *Aspinwall*, 19 N. Y. 119; s. c. 6 Duer (N. Y.), 176; *Cooper* v. *Shaver et al.*, 41 Barb. (N. Y.) 151; *Camp* v. *Burne*, 41 Mo. 525; *Danbury & N. Railroad Co.* v. *Wilson*, 22 Conn. 435; *Ellis* v. *Schmock & Thomas*, 5 Bing. 521; *McFarlan* v. *The Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Rector & Co.* v. *Lovett*, 1 Hall (N. Y.), 191; *Topping* v. *Beckford*, 4 Allen (Mass.), 121; *Dooley* v. *Wolcott*, id. 407; *Eppes* v. *Railroad Company*, 35 Ala. 33; *Hamtramack* v. *Bank of Edwardsville*, 2 Mo. 169; *Jones* v. *Cincinnati Type Foundry*, 14 Ind. 88; *Worcester Med. Ins.* v. *Harding*, 11 Cush. (Mass.) 285; *Hughes* v. *Bank of Somerset*, 5 Litt. (Ky.) 47; *Tar River Nav. Co.* v. *Neal*, 3 Hawks (N. C.), 520. *Demurrer sustained.*

At a subsequent day of the term, pursuant to leave granted, three pleas were filed. The questions arising upon demurrers to the special pleas were argued by the same counsel.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Since the opinion of the court was delivered in this case, the defendant obtained leave to plead further, and has filed three pleas. They are: —

First, *Nil debet*, upon which the plaintiff has taken issue.

Second, That the comptroller of the currency has "deter-

mined and decided to exact from the defendant, and from a number of stockholders of said National Banking Association less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said National Banking Association, with the intent and purpose to compel this defendant and others of said shareholders who may be solvent to contribute the entire sum necessary to pay the debts and liabilities of the said National Banking Association, without any contribution from those who are insolvent."

It is a sufficient objection to this plea that the comptroller has ordered that each stockholder shall pay to the receiver the par of his stock. This order cannot be controverted in a suit against the stockholder. It is conclusive upon him, and makes it his duty to pay. *Kennedy* v. *Gibson and Others*, 8 Wall. 498. What may be done or intended with respect to other stockholders is immaterial in his case.

The plea is, also, manifestly bad for vagueness and uncertainty.

Third, That the comptroller has decided to pay a large amount of claims against the bank for which the bank is not responsible, and that, aside from these claims, there are means enough already in his hands to meet the liabilities of the bank.

The same objection lies to this plea as to the preceding one, and the same authority applies. If the receiver intends to violate, or shall violate, his duty in discharging the trust confided to him, the remedy must be sought in another proceeding. It cannot avail the defendant in this action.

Both demurrers are sustained.

The parties have filed a written stipulation submitting the issues raised upon the first plea to the court and waiving the intervention of a jury.

With respect to this issue, we find the proofs in the record amply sufficient to sustain the plaintiff's case.

Judgment must, therefore, be rendered against the defendant for the par of his stock, with interest, as claimed in the declaration, and costs; and it is *So ordered.*

COUNTY OF SCOTLAND v. THOMAS.

1. The fourteenth section of article 11 of the Constitution of Missouri, adopted in 1865, which declares that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," prohibits any subsequent legislative grants to any municipal corporation, of authority to become a stockholder in, or to loan its credit to, a company, except upon the prescribed conditions; but it does not purport to take away any authority already granted.
2. The Alexandria and Bloomfield Railroad Company was incorporated under an act of the general assembly of Missouri, approved Feb. 9, 1857, which provided that "it shall be lawful for the county court of any county, in which any part of said road may be, to subscribe to the stock of said company," and issue its bonds therefor. The laws of the State reserved to the general assembly the right to amend the charter, and the company was, pursuant to the authority conferred by the act of March 2, 1869, consolidated with a corporation in Iowa, having like authority from that State; but the general direction of the road was not thereby changed. The road of the company passes through the county of Scotland; and the county court, in the absence of any election by the qualified electors of that county, subscribed, in August, 1870, to the capital stock of said consolidated company, and issued the bonds of the county in payment therefor. *Held*, 1. That the power of the county to subscribe for stock in the Alexandria and Bloomfield Railroad Company was the right and privilege of the company, and passed, with its other rights and privileges, into the new conditions of existence which it assumed under the consolidation. 2. That the subscription made by the court was the act of the county, and binding upon it, and that the bonds so issued are valid.
3. *Harshman* v. *Bates County*, 92 U. S. 569, is not in conflict with the rulings in this case.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was a suit brought upon certain coupons attached to bonds, purporting to have been issued by the county of Scotland, in the State of Missouri.

The bonds were in the words and figures following, except that each bond had a separate number: —

"$1,000.] UNITED STATES OF AMERICA. [No. 65.

"*Eight-per-cent Railroad Bond.*

"County of Scotland.] [Twenty-five years.

"Know all men by these presents, that the county of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri,

Iowa, and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company) of the State of Missouri, and the Iowa Southern Railway Company of the State of Iowa, in the sum of $1,000, which sum the said county hereby promises to pay to the said Missouri, Iowa, and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company in New York, on the thirty-first day of December, A.D. 1895, together with interest thereon from the thirty-first day of December, 1870, at the rate of eight per cent per annum, which interest shall be payable annually, in the city of New York, on the thirty-first day of December in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the county court of said Scotland County, for subscription to the stock of the Missouri, Iowa, and Nebraska Railway Company, as authorized by an act of the general assembly of the State of Missouri, entitled "An Act to incorporate the Alexandria and Bloomfield Railroad Company," approved Feb. 9, 1857.

"In testimony whereof, the said county of Scotland has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the town of Memphis, in the county of Scotland, in the State of Missouri, this first day of September, A.D. 1870.

"WILLIAM DAWSON,
"*Presiding Justice of the County Court of Scotland County, Mo.*

"Attest:

SCOTLAND COUNTY COURT, MISSOURI, SEAL.

"STERLING MCDONOLD,
"*Clerk of the County Court of Scotland County, Mo.*"

To each of which bonds were annexed twenty-five interest coupons, each for the sum of $80, maturing annually for the interest thereon. These bonds were delivered, before the 21st of December, 1871, to the "Missouri, Iowa, and Nebraska Railway Company," with the interest coupons attached, in payment of the subscription to the capital stock of the company; and such of them as had attached to them the coupons sued on were, before the maturity of the second maturing coupons, together with all the coupons except the ones first maturing,

sold for value, and transferred by delivery to the plaintiff, who is the holder and owner thereof. The plaintiff caused the coupons sued on to be presented for payment at maturity, and payment was not made.

The petition alleged, in addition to the foregoing facts, that by an act of the general assembly of Missouri, entitled "An Act to incorporate the Alexandria and Bloomfield Railroad Company," approved Feb. 9, 1857, the said company was incorporated, and thereafter was duly organized under said act of incorporation; that the tenth section of said act of incorporation provides as follows: —

"The said company shall in all things be subject to the same restrictions, and entitled to all the privileges, rights, and immunities which were granted to the North Missouri Railroad Company, by an act entitled 'An Act to incorporate the North Missouri Railroad Company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

The fourteenth section of the said act of March 3, 1851, contains the following provision, to wit: —

"It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company (North Missouri Railroad Company), and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county."

That a part of the route of the road of the "Alexandria and Bloomfield Railroad Company" was within the county of Scotland, as designated in the act of incorporation.

That in pursuance of an act of the general assembly of Missouri, entitled "An Act to amend an act entitled 'An Act to incorporate the Alexandria and Bloomfield Railroad Company, approved Feb. 9, 1857,' approved Feb. 19, 1866," authorizing the Alexandria and Bloomfield Railroad Company to change its name, and to extend its road from Luray, in Clark County, Mo., to Nebraska City, in Nebraska Territory, the said company did change its corporate name to that of the "Alexandria and Nebraska City Railroad Company."

The defendant demurred; but, before the demurrer was submitted, it was stipulated between the parties that the question of subscribing to the stock of the "Missouri, Iowa, and Nebraska Railway Company" had never been submitted to a vote of the qualified voters of Scotland County; and that, in determining the questions raised by the demurrer, the court might consider this fact as if it had been averred in the complaint.

It was further agreed that the articles of consolidation between the Iowa Southern Railway Company and the Alexandria and Nebraska City Railroad Company, entered into March 26, 1870, and the orders of the county court of Scotland County, should be taken and considered by the court, as facts admitted in determining the questions raised by the demurrer.

By those articles, it was provided that the consolidated company should bear the name of the Missouri, Iowa, and Nebraska Railway Company; that its capital stock should be $13,000,000, to be divided into one hundred and thirty thousand shares of $100 each; that the directors might increase it when necessary, upon the approval of a majority of the stockholders; that the line of the railway should extend from the city of Alexandria, in Missouri, on the Mississippi River, to Centreville, Iowa, thence west to the Missouri River; and that the company should assume and pay all debts owing, and all contracts or agreements entered into, by either of the companies. The company was also authorized to borrow money to an amount not exceeding two-thirds of its capital stock, issue bonds, and secure their payment by mortgage on all the property of both companies.

The material parts of the act of March 2, 1869, under which the "Alexandria and Nebraska City Railroad Company," and the "Iowa Southern Railway Company," a corporation created under the laws of Iowa, entered into articles of consolidation are as follows: —

"SECTION 1. That any railroad company organized under the general or special laws of this State, whose track shall, at the line of the State, connect with the track of the railroad of any company organized under the general or special laws of any adjoining State, is hereby authorized to make and enter into any agreement with

such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining State in which the road is located with which connection is thus formed."

Sect. 2 requires that the consolidation shall be approved by the holders of a majority of the stock in each of the old companies.

Sect. 3 provides, that when the terms of consolidation shall have been agreed upon, &c., "it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company, which shall be formed by the consolidation; and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement, and the resolutions of consolidation, and the name adopted for the new company, shall be filed with the secretary of State," &c.

"SECT. 4. Any such consolidated company shall be subject to all the liabilities and bound by all the obligations of the company within this State which may be thus consolidated with one in the adjacent State, as fully as if such consolidation had not taken place; and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place."

The demurrer was overruled, and judgment rendered for the plaintiff; whereupon the county sued out this writ of error.

Mr. George W. McCrary and *Mr. J. O. Broadhead* for the plaintiff in error.

1. The plaintiff below is not an innocent purchaser of the bonds sued on, without notice.

(*a.*) Because the defect complained of is a want of power, and not an irregular exercise of an admitted power.

(*b.*) Because the act under which the right to issue the

bonds in suit is claimed is set out in the bonds themselves, and the purchaser was put upon inquiry, and had notice of all the facts.

2. The validity of the bonds can only be sustained by showing that the county was authorized by the law as it stood prior to July, 1865, when the constitutional prohibition took effect, to subscribe to the stock of the Alexandria and Bloomfield Railroad Company, and to the stock of any company that might be formed by consolidation with it.

3. Whatever might be claimed if the old company, by its charter or the law in force prior to that date, had been vested with the power to consolidate, it is clear that, in the absence of that power, the right of the county thereafter to subscribe was a right to subscribe to the original corporation, and no other. *Harshman* v. *Bates County*, 92 U. S. 569.

4. If the intent of the act of 1869 was, as claimed, to authorize a new company to be formed by consolidation of the Alexandria and Nebraska City Railroad Company, and the Iowa Southern Railway Company, and to empower Scotland County to subscribe, without a vote of the people, to the stock of this new company, then that act is so far unconstitutional and void.

5. The consolidation effected by changing the Alexandria and Bloomfield Railroad Company into the Alexandria and Nebraska City Railroad Company, and consolidating the latter with the Iowa Southern Railway Company, by which was formed the Missouri, Iowa, and Nebraska Railway Company, was a fundamental alteration of the charter of the first-named company, not provided for or contemplated by either the charter itself or the general laws of the State, as they stood when the Constitution of 1865 was adopted.

Mr. A. J. Baker and *Mr. F. T. Hughes*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This action was brought by plaintiff below (the defendant in error) to recover the amount of certain interest coupons attached to certain bonds issued by order of the county court of Scotland County, Mo. (the defendant below), on behalf of the county, to pay for a subscription of stock to the Missouri, Iowa,

and Nebraska Railway Company. The county contests the validity of the bonds, on the ground that the question of subscribing to the stock was never submitted to a vote of the qualified voters of the county, as required by the Constitution of the State adopted in 1865, the subscription being voted and the bonds being issued in 1870. The plaintiff answers this objection by showing that the power to make the subscription was conferred in 1857, in the charter of a company called the Alexandria and Bloomfield Railroad Company, before the Constitution was adopted, and that this company, by consolidation with other companies, formed the Missouri, Iowa, and Nebraska Railway Company, and brought to it all its own privileges and powers, — and, amongst others, that of receiving county subscriptions to its capital stock. The county replies to this argument, that however valid it may be to sustain subscriptions made to the Alexandria and Bloomfield Railroad Company itself, had that company remained distinct, as originally chartered, it cannot avail to support a subscription to the stock of a new and different company, having a much greater amount of capital stock, and a much longer and different route of railroad, running into another State. The question was raised in the court below by demurrer to the petition, and judgment was given for the plaintiff.

The clause of the Constitution on which the defendant relies is the fourteenth section of art. 11, and is as follows: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations: it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come. This has been settled by the Supreme Court of Missouri in several well-considered decisions. See *The State* v. *Sullivan County*, 51 Mo. 522; *The State* v. *Greene County*, 54 id. 540. In the former case, the court say: "Power conferred on counties to take and subscribe stock

without a submission to a vote of the people, before the Constitution went into operation, remained unaffected by that instrument." The same view was taken by this court in the recent case of *County of Callaway* v. *Foster*, 93 U. S. 567. See also *State* v. *Maysville & Lexington Railroad Co.*, 13 B. Mon. (Ky.) 1.

The specific question in the present case, therefore, is, whether the authority given to counties and towns in 1857 to subscribe to the capital stock of the Alexandria and Bloomfield Railroad Company has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the constitutional provision referred to. The Constitution does not itself, as we have seen, interfere with authority given previous to its adoption.

That simple consolidation with another company does not extinguish the power of the counties to subscribe, or the privilege of the company to receive subscriptions, was decided in the case of *The State* v. *Greene County*, 54 Mo. 540. In that case, the Kansas City, Galveston, and Lake Superior Railroad Company was chartered in 1857, with power to construct a branch road from Kansas City to the southern boundary of the State; and power was given to the county courts of any county through which the road or any of its branches might run, to subscribe to the stock of the company, and issue its bonds therefor. The company afterwards changed its name, and, in 1870, consolidated with the Hannibal and St. Joseph Railroad Company; and the latter company continued the work of constructing the branch road referred to, which had been begun by the Kansas City company. The branch was built under a separate organization created by the parent company, called the Kansas City and Memphis Railroad Company, but under the control and with the aid of the parent company. The county court of Greene County, in 1870, subscribed to the capital stock of the Hannibal and St. Joseph Railroad Company, issued to aid in building and equipping the branch road, which ran through the county. The Supreme Court of Missouri decided that the subscription was valid, and that the power to subscribe, originally given, still subsisted, unaffected by the consolidation. The cases decided by this court of *The*

Philadelphia & Wilmington Railroad Co. v. *Maryland*, 10 How. 376, and *Tomlinson* v. *Branch*, 15 Wall. 460, were cited and relied on, for the purpose of showing that where a consolidation is effected between two railroad companies, and nothing to the contrary is indicated, the rights and privileges, as well as the duties and liabilities, of each continue to exist as before in the hands of the new organization. It seems to us that this decision in the Greene County case governs the present case. It is true the court laid considerable stress on the fact that the branch road in that case was a distinct interest from that of the main line, and was not liable for its obligations or liabilities, and the holders of the stock in the branch road had the right to control its affairs; and this feature was not changed by the consolidation. This fact, undoubtedly, prevents the case from being an exact precedent for the present one. But the close and intimate relations which in other respects connected the branch with the main line in that case give to the decision a good deal of importance. The principles adopted were substantially the same as those involved in the present case. The facts are not very fully stated in the report; but it would appear from the statement of the dissenting judge, p. 557, that the stock subscribed for in that case was the stock of the Hannibal and St. Joseph Railroad Company. As such, though it may have been special stock applicable to the branch road, it made the holder a member of the parent company, entitled to vote for its directors, and no doubt in other ways connected with its fortunes.

In that case, as in this, the power to consolidate was given after the original charter was granted, and after the Constitution went into effect. But that was not regarded as affecting the power. By general laws of the State, in force when the original charter was granted, the legislature had reserved the power to alter, suspend, and repeal all charters of incorporation, and had specially reserved this power in the general railroad act. See Rev. Stat. of Mo., 1855, pp. 871, 488. It would seem clear, therefore, that alterations of the charter were admissible, and would not affect rights of the company untouched thereby, nor a power to subscribe to its stock previously existing. See *County of Callaway* v. *Foster*, 93 U. S. 567.

The power to amend thus existing, the amending acts in this case do not subvert the original purposes of the charter, but rather carry them out and perfect them. The railroad authorized by it was "a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said State line." Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which is only required to be "in the direction of Bloomfield." A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the purpose to bring Alexandria, a port of Missouri on the Mississippi River, in connection with the rich region of southern and western Iowa, by means of the road then being chartered, and a road to connect therewith, running into the State of Iowa. This purpose will be most effectually attained by the construction of the continuous line contemplated by the consolidated companies. The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated. The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa, and Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and, if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force.

The decision of this court in the case of *Harshman* v. *Bates County*, 92 U. S. 569, is urged against this view of the case; but we do not think it applicable. In that case, the question was, whether authority given to the county court by the electors of a township to subscribe in its behalf for stock in a certain

railroad company, continued to exist after the company had ceased to exist, by being absorbed in another company by consolidation? We held that it did not. The county court was regarded as being the mere agent of the township, having no discretion to act beyond the precise terms of the power given. The powers of an agent or attorney, authorized to act for another, are very different from those possessed by a person acting in his own behalf. Had the charter of the Alexandria and Bloomfield Railroad Company authorized foreign corporations to subscribe to its stock (supposing that by the general law of Missouri they had no such power), they would undoubtedly have retained that power after the consolidation; it being in their discretion to exercise it or not. But if any such foreign corporation had, before the consolidation, sent an order to a firm in St. Louis to subscribe stock for it in the original company, the firm could not have made the subscription after the consolidation, without consulting their principals. Such a material change of circumstances would have rendered the subscription an excess of the power given to them. Authority given to a person, to be exercised for his own benefit and at his own discretion, may be exercised by him under changes of circumstances that would amount to a revocation of a power given to an attorney, unless it expressly conferred discretion. A recurrence to the opinion in the Harshman case will show that this distinction underlies the reasons given for the judgment in that case. The county court of Scotland County, in the present case, acted as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation in question. For, as before remarked, the county courts, in reference to the subscription in question, represented the counties themselves, as their officially constituted authorities. This is distinctly stated by the Supreme Court of Missouri in the case of *The Hannibal & St. Jo. Railroad Co.* v. *Marion County*, 36 Mo. 303. The power given to the county courts intersected by the Alexandria and Bloomfield Railroad to subscribe to its stock, was given to them as representing the counties. When they subscribed for the stock, it was the county that subscribed. It was discretionary with them whether

to subscribe or not, and (within the limits imposed by the act) how much they should subscribe.

But the case has other aspects, which it is necessary to take into consideration. If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. The principles laid down in the case of the *Philadelphia, Wilmington, & Baltimore Railroad Co.* v. *Maryland*, 10 How. 376, and *Tomlinson* v. *Branch*, 15 Wall. 460, and recently reaffirmed in *Branch* v. *City of Charleston*, 92 U. S. 677, seem to us directly applicable. Subscription to the stock was not only a power of the county, but a privilege of the company, — being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. It was expressly so held by the Supreme Court of Missouri in the case of *Smith* v. *County of Clark*, 54 Mo. 58; and the same principle had been adopted in the earlier case of *The Hannibal & St. Jo. Railroad Co.* v. *Marion County*, 36 id. 294, 304. The latter company was by its charter "entitled to all the privileges, rights, and immunities which were granted to the Louis-

iana and Columbia Railroad Company, so far as applicable," &c. The right to receive county subscriptions was held to be one of these privileges, rights, and immunities. The court said: —

"It was under this section that the [county] court proceeded when the stock was first taken and the notes issued. The legislature gives the company all the rights, privileges, and immunities contained therein, the same as if it had been re-enacted. The language seems broad enough, by reasonable construction, to fully sustain the acts of the county court." 36 id. 304.

In *Smith* v. *County of Clark*, the same views were held with regard to the charter now in question. The court say: —

"The power thus conceded to the courts or other municipal bodies may well be termed a privilege to the corporations, and we see no substantial objection to a transfer of such a privilege by simply, in general terms, embodying the section of the original act which granted it into the new law. That such was the intention of the legislature and of the railroad company is clear; and, if the word 'privilege' admits of the narrow construction claimed, the practical construction it has received in this State, as may be seen by reference to the decisions of our courts, would preclude any inquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charters would have been of no value." 54 id. 67.

The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation.

The argument sought to be drawn from the distinction, that the company with which the consolidation was effected belonged to another State, we fail to appreciate. If the legislature of Missouri authorized it, what difference can it make whether the connecting company belongs to Missouri or to Iowa? There is no difference in principle. The Philadelphia, Wilmington, and Baltimore Railroad Company, in its consolidated form, combined the roads and charters of three different States; and yet it was held to be invested with the rights and privileges of each, as applicable to the several parts of the line. See also, to the same purport, the case of *Hanna* v. *The Cincinnati, Fort Wayne, & Chicago Railroad Co.*, 20 Ind. 30.

Other points were raised on the argument, which it is unnecessary to discuss, as this was the principal one relied on, and presented the only serious difficulty in the case.

Judgment affirmed.

MR. JUSTICE MILLER dissented.

MR. JUSTICE FIELD did not sit in this case, nor take any part in the decision.

CAWOOD PATENT.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* TURRILL; MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY *v.* SAME; CHICAGO AND ALTON RAILROAD COMPANY *v.* SAME; CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY *v.* SAME; PITTSBURGH, FORT WAYNE, AND CHICAGO RAILWAY COMPANY *v.* SAME.

1. This court, in affirming the validity of the letters-patent No. 15,687, granted to Joseph D. Cawood Sept. 9, 1856, for "an improvement in the common anvil or swedge-block for the purpose of welding up and re-forming the ends of railroad rails when they have been exfoliated, or become shattered from unequal wear occasioned by the inequalities of the road," &c., which were before it in *Turrill v. Michigan Southern, &c. Railroad Co.*, 1 Wall. 491, holds, in addition to what was declared in that case, that they embrace a bottom support for the rail on the anvil; and that they are infringed by the machines known as the "Illinois Central," the "Etheridge," and the "Whitcomb," but not by those known as the "Bayonet vise," the "Michigan Southern," and the "Beebe and Smith."
2. Where an account for the infringement of letters-patent is prayed for and decreed, the record filed here should set it forth. This court should not be called upon to perform the duties of a master.
3. Considering the number of feet of rails mended by the respondents in the use of the machines covered by said letters-patent, and of those which infringe them, the gain in mending, compared with the cost of mending on the common anvil, and the saving in fuel and labor, the damages decreed by the court below are not excessive.
4. In settling an account between a patentee and an infringer of his letters-patent, the question is not what profits the latter made in his business, or from his manner of conducting it, but what advantage he derived from his use of the patented invention.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Argued by *Mr. George Gifford*, *Mr. John B. Niles*, and *Mr. George Payson*, and submitted on printed argument by *Mr. R. Biddle Roberts*, for the appellants.

Mr. E. W. Stoughton, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

These five cases may very conveniently be considered together, since they all present, in the main, the same questions.

The Cawood patent, for alleged infringements of which the suits were brought, has heretofore been the subject of consideration in this court, where it has been at least partially construed, and its limits have been defined. 1 Wall. 491. It is a patent "for an alleged new and useful improvement in the common anvil or swedge-block, for the purpose of welding up and re-forming the ends of railroad rails when they have exfoliated or become shattered from unequal wear." Such is the general description given by the patentee in his specification, followed by a more detailed one, which needs careful consideration, in order to discover what the invention claimed distinctively was. The patentee refers to an annexed drawing, made a part of the specification, and claimed as giving a perspective view of the machine or invention. It represents a bed-sill on which is placed an anvil or swedge-block of cast-iron, across the face of which there are recesses or dies shaped like the side of the rail to be repaired. A solid and fixed block, cast as a part of the anvil, is also represented, with its side face shaped to the side of the rail when placed in its natural position, and a movable press-block held down upon the anvil by dovetailed tongues and grooves, and operated by two eccentric cams, moving it back and forward, toward and from, the fixed block. The face of the movable block is also shaped to fit the side of the rail next to it, and the two blocks grasp the rail on each side while its ends are being re-formed, the movable one having sufficient travel to allow the rail to be extricated without altering its vertical position. A rail of the T form is also represented in position between the two press-blocks. Having thus exhibited his invention by the drawing, the patentee proceeds to describe how he usually makes it, and the manner of

its use. After having stated that he usually makes his improved anvil and swedge-block between four and five feet long, and sixteen inches wide across the face, with two forms or recesses at one end, right and left, of a form corresponding to the sides of the rail, he adds: —

"Close to these is a cast or raised block nearly as high as the rail, and with its farther edge also shaped to fit the sides of the rail, when it lies across the anvil in its natural position. Next this [says he] I attach to the face of the anvil, by dovetailed tongues and grooves, or in any other convenient manner, what I call a movable press-block with a similar but reversed shaped edge, lying opposite the other, so as to enclose the rail between the two, as in the jaws of a vise. The blocks I work by eccentric cams on a shaft which is attached to the anvil by two standards, with bearings either cast on or bolted to the edge of the same, so that half a turn of the crank will move the press-block over a space a little more than half the width of the rail."

The mode of use is then described. The rail and the piece of iron to be welded on having been heated, the former is swung from the fire into the space between the blocks, when, by half a turn of the cams, the blocks are closed upon it. The welding piece is then laid on top of the rail and levelled up by a swage held by the smith, of the form of that section which projects above the blocks. Such is the description. It is succeeded by the claim, as follows: —

"I do not claim the anvil-block nor its recesses, but what I do claim as my invention, and desire to secure by letters-patent, is the movable press-block, having its edge formed to the sides of the rail in combination with another block with its edge of a similar but reversed form (the movable block to be operated by two cams, or in any other convenient manner), for the purpose of pressing between them a T or otherwise shaped rail, thereby greatly facilitating the difficult operation of welding and renewing the ends of such rails after they have been damaged, in the manner herein described and set forth."

What, then, in view of this specification and claim, was the invention patented? In *Turrill* v. *Michigan Southern, &c. Railroad Co.*, 1 Wall. 491, this court declared it to be "such a movable press-block as is described, having its edge

formed to the side of the rail, in combination with such other block as is described, with its edge of similar but reversed form, arranged as described, and combined and operating in the particular way described, for the special purpose of effecting the desired result." This was enough for that case as it then appeared. But the present case requires a more minute analysis. Viewing the claim as interpreted by the preceding description, to which it refers, and by the drawing, it is not difficult to discover what the patentee supposed he had invented. It was not any kind of movable press-block combined and operating in any way, with any kind of fixed block, to effect any useful result. His avowed purpose was to form a mechanism for welding up and re-forming the ends of exfoliated and crushed rails, or, rather, to hold them in a convenient position for such welding and re-forming, at the same time preserving their shape. His manner of accomplishing this result was evidently considered by him as of the very essence of his invention. On one side of the rail, when on the anvil, it is to be supported by a fixed block, part of the anvil itself, shaped reversely so as to fit the shape of the rail, and on the other it is to be supported and held in place by a movable block with a face adjusted to the shape of the rail on that side, the movable block capable of advance towards the fixed block, and of retrogradation after the rail is placed on the anvil. The rail is also, when in place, to be supported under its base by the anvil. This is fairly deducible from the manifest purpose of the inventor, from his drawing, and from his specification. It is necessary to the result supposed to have been obtained, for, unless supported at the base, the heated end of the rail would be in danger of being driven downward between the blocks by the blows of the sledge or hammer used in welding, while the part of the rail not operated upon, being cooler, would remain suspended between the blocks. And that the invention contemplates a bottom support for the rail on the anvil is made clear by the drawing. That shows no space between the anvil and the base of the rail. On the contrary, it exhibits a bottom support on the anvil, as well as lateral support by the modelled faces of the two blocks. The rail is thus confined on three of its sides, as in a mould. And the words of the specification,

fairly construed, convey the same meaning. Thus it is said the fixed block is cast nearly as high as the anvil, with its farther edge shaped to fit the side of the rail, when it lies across the anvil in its natural position. The rail, then, is to lie upon the anvil, having the anvil as a bottom support. Unless it does, the shaped edge of the blocks cannot fit its side.

Having thus endeavored to ascertain what is the true idea of the patent, we are prepared to examine the devices which the appellants contend were in existence and use before Cawood made his invention. Of these there are three only that have been pressed upon our attention. The first is the angle-iron machine. Between this and the Cawood machine there are points of resemblance, but there are also very substantial differences. The purposes and objects sought to be accomplished by the machines are entirely unlike. It is always of importance to consider the object an inventor of a machine had in view, because thus the operation of its different parts and the functions performed by each can be better understood. The purpose of the angle-iron machine is to facilitate making angle-iron. That of the Cawood is to aid in mending rails already made. The angle-iron machine is a device to assist in welding together, at right angles with each other, two iron bars, making a fillet in the interior angle to strengthen the rail when made. To effect this, the fixed block on the anvil has necessarily a peculiar construction, unlike that in the Cawood machine. It is bevelled, or rounded off, at the top of the face opposite the movable block, so as to give room for the formation of the fillet. Consequently, that face cannot answer reversely to the face of the movable block. And not only is the face of the fixed block uniformly and necessarily unlike that of the fixed block in the Cawood machine, but its function is entirely different. It is to furnish support for one of the two bars designed for the formation of the angle iron. One entire limb of the angle iron is laid upon top of the block, unconfined laterally, and there exposed to the hammer, the block being the anvil. The iron is thus left free to spread out in both directions, instead of being prevented from spreading laterally by the press-block, as in the Cawood machine. There is nothing to preserve a shape already formed. The other bar of the angle iron, or its other limb,

hangs suspended from the upper edge of the fixed block, and is not supported against the blows of the hammer at any other part of its height than the under side of the limb which lies on the block, instead of being supported concurrently at two parts of its height by the grasp of the two blocks, and supported also under its base. In the Cawood machine, the hammering is not over the blocks or upon them, but exclusively on the rail between them. The fixed block in that is not cast quite so high as the rail, and the new piece is welded on and shaped, not on or over either block, but yet above the surface of that part of the anvil that constitutes the block. The patentee, after stating that the raised block of the anvil is cast "nearly as high as the rail" (the two blocks thus being made to support the under side of the crown of the rail, and confining the lower half of the crown laterally), says, "the welded piece is laid on top of the rail in the usual way, and levelled up and shaped by a swedge held by the smith, of the form of that section which projects above the blocks." Thus the iron is not permitted to spread laterally under the blows of the hammer over the press-blocks and down between them. In fact, the blocks have nothing to do with the formation of that section of the rail that projects above them. It is very evident, therefore, that the fixed block in the angle-iron machine is not intended or adapted to perform the office which the fixed block does perform in the Cawood. In fact, it cannot perform it. Besides, in the angle-iron machine, no provision is made for a bottom support of a rail. The height of the blocks above the body of the anvil is not regulated with reference to any bottom support, and the bar between the jaws is held as in a vise. Support beneath the flange or base of the rail, when in place for reparation, is, as we have seen, a feature of the Cawood improvement. It would defeat the purposes and uses of the angle-iron machine. The bottom serves for an anvil in the Cawood, to resist the downward force of the blows on the top of the rail and to prevent forcing the heated iron into the neck of the rail and increasing its length. But one of the objects, and a result secured in the angle-iron machine, is increasing the length and width of that portion of the bar operated upon by the hammer, the part which lies upon the fixed block. There is also a wide differ-

ence in the functions of the movable blocks of the two machines. That of the angle-iron machine is principally to act as one of the jaws of a vise to hold the bar against the fixed block or raised part of the anvil, while the welding is being made and while the fillet is being formed in the interior angle. It is not to preserve the shape of an already formed rail, or to resist the lateral pressure caused by the hammering. Yet such are the functions of the Cawood movable block. We think, therefore, that if the purposes of the two devices be considered, as well as their possible modes of use, the arrangement of their several parts respectively to each other, and the different functions of those parts, it cannot be held that the angle-iron machine contained the invention or involved the principle of the invention described in the patent granted to Cawood.

The second device, which the appellants insist anticipated the Cawood invention, is what is denominated the bayonet-machine, used at the Springfield Armory before 1850 and since, for forging parts of bayonets. In some particulars there are resemblances between the devices; but there are obvious dissimilarities, not only in the purpose and results sought to be obtained, but in the relation of the parts to each other, in the work to be done by those parts, in the manner and effect of their combination, and in their mode of operation. The differences are sufficient, in our opinion, to justify the conclusion that the machines are different devices, embodying distinct principles. The bayonet-machine is in form and in substance nothing but a hinge-vise, with a peculiar shape of the jaws, intended to facilitate operations upon the shank and socket of a bayonet. The jaws are fitted to hold the bayonet in place, while the shank is turned upward, through and above their upper surface, in order that a flat piece of iron may be welded upon the shank and prepared to be afterwards converted into a socket. The lateral surfaces of the jaws come into actual contact with each other, except for a short space, equal to the diameter of the bayonet-shank. They hold only the lower segment of the shank, allowing the upper segment to project a considerable distance above the upper surface. The inner surfaces do not constitute a mould. They do not maintain the shape of the shank, enclosed within and between them during the process of

top-welding and shaping. They are intended for no such purpose, nor are they fitted for it. Their sole function appears to be to sustain the shaft of the bayonet in an upright position, while a flat piece of iron is being welded upon its end. It is only in a very limited sense that the machine can be called an anvil. One side of it is stationary, the upper portion of its front forming what may be called a fixed jaw. The other side, being merely an arm, vibrates upon a hinge, or upon journals attaching it to the fixed side, at or near its base. Such are the leading features of the machine. Comparing them and the operation of the machine with those of the Cawood, it is very evident the devices are not substantially the same. The Cawood is an improved anvil, not a vise. It has a fixed block cast upon an anvil, and its movable block rests upon the anvil, attached to it, and moving towards and from the fixed block horizontally, in a plane parallel with the anvil's upper surface, instead of moving on the arc of a circle. The two blocks together form a mould, and they are combined with each other through the anvil. These are very substantial differences from the bayonet-machine. The combination through the anvil is essential for the work intended to be done. It gives the immediate support of the anvil to the bottom of the rail, as its tread or crown is being hammered; while in the bayonet-machine the iron enclosed is supported from beneath, during the process of welding, exclusively by the jaws, at a considerable distance from the point of connection between them. Again, in the Cawood, the inner surface of the blocks is designed and fitted to maintain the shape of the rail while it is hammered, — an office not contemplated for the jaws of the bayonet-machine. The bayonet-socket is fashioned to its desired shape, after the release of the iron from the jaws. So, also, the relation of the blocks and jaws to the rail or iron, when in place to be operated upon, is different in the two machines. In the Cawood, the blocks come nearly to the top of the rail, affording lateral support to almost the whole of each side, while in the other there is no such lateral support. And the hammering is entirely between the blocks, instead of being partly over or upon them.

Still another important difference is apparent. In the bayonet machine the movable jaw is pushed back by a spring

interposed between the two arms of the vise, and forced forward by leverage sufficient to overcome the resistance of the spring, and hold it compressed while the jaws are in contact with each other. It is obvious that no such means of moving the movable block would answer for Cawood's machine. It is true he did not claim operating it by cams exclusively. He claimed moving the block by cams, or "in any other convenient manner;" but that meant by means adapted to the work the machine was intended to perform. These several differences are too many and too great to be considered merely formal. Not only the object of Cawood's device was novel, but so, also, was the function of the blocks, their combination with each other, and the mode of operation. The general appearance of the bayonet machine, and, as we have said, its distinctive character, was that of a vise. We think, therefore, it cannot be regarded as containing the principle embodied in the Cawood invention. We cannot think it could teach how to make the improvement in the common anvil or swage-block for re-forming and welding the ends of railroad rails, which was devised by Cawood, and which has gone into large use.

It is next contended that the patent was anticipated by the Church machine, patented in England in 1846. We have before us the specification, and a model constructed from that specification. It requires but little attention. It is described as a machine which may be usefully employed for straightening and flattening the rails for railways, as well as other similar uses. As the model represents it, the machine is totally incapable of performing the work of the Cawood machine. It is not an anvil. There is no fixed block cast as a part of an anvil. There is a stationary die, part of a frame against which one side of the rail is placed, to resist the lateral pressure exerted upon it by a sliding lateral die on the other side of the rail, and above is a horizontal bar which is forced downwards by a series of jointed levers, carrying another die upon the upper surface of the rail. It is plain this description and this model could never have informed any one of the device Cawood invented. It does not show how the blocks or jaws can be combined so as to leave the upper face of the rail to be repaired exposed for the action of a swage and a hammer. It is said, however, if the upper

horizontal bar with its die and jointed levers were taken away, a mechanic might understand how the remnant could be altered and employed as a Cawood machine is employed, and for the same uses. That, however, evades the question to be answered, which is, whether the specification was sufficient to enable a mechanic skilled in mechanical arts to construct and carry into practical use the Cawood machine; or, in other words, whether whatever is essential to the Cawood machine could be read out of the prior specification. We think no such information was given by the English patent.

That the old slide vise contains the principle of the Cawood machine has not been contended with much earnestness, and certainly it cannot be successfully. Nothing, then, is found in the case sufficient to show that the patent is void for want of novelty of the invention, and the court was not in error in holding it valid.

We come next to the question whether machines employed by the defendants in repairing the ends of railroad rails are infringements of the patent. Those which have been used by the several companies defendants, and which are claimed to have been infringements, were, in addition to the Cawood, seven in number. They were the "Illinois Central," the "Etheridge," the "Whitcomb or Cleaveland block," the "Michigan Southern," the "Bayonet vise," the "Beebee and Smith," and the "Blaine reversible rolls," all of which, except the last, were held by the Circuit Court to be infringements. Of these, the Illinois Central Railroad Company has used only the "Illinois Central," the "Bayonet vise," and the "Beebee and Smith;" the Pittsburg, Fort Wayne, and Chicago Railroad Company has used the Whitcomb or Cleaveland block; the Chicago and Alton Railroad Company has used only the Whitcomb; the Chicago, Burlington, and Quincy Railroad Company has used only the Cawood and the Etheridge; and the Michigan Southern and Northern Indiana has used only the Beebee and Smith, the Bayonet vise, and the Whitcomb. We have had before us models and drawings of them all, and we have considered the testimony respecting them which is found in the records. It is but faintly contended, if at all, that the Illinois Central, the Etheridge, and the Whitcomb machines are not

infringements of the Cawood. The principle of each of them, the object sought for, the combination and arrangement of the parts, and the mode of operation for the purpose of effecting the described result, are so manifestly the same as that described in the complainant's patent that a detailed examination of them is unnecessary. But it is earnestly insisted that neither the use of the Bayonet vise, nor that of the Michigan Southern machine, nor that of the Beebee and Smith, used by some of the defendants, can rightfully be held to infringe the patent; and such is our opinion. We have already called attention to the fact that a very limited construction must be given to the claim of the Cawood patent, in view of the state of the art when the patent was granted, and of the explanations contained in the specification. It was said in *Turrill* v. *Michigan Southern, &c. Railroad Company*, *supra*, "special devices are described as combined and arranged in a particular manner, and operating only in a special and peculiar way, for a special purpose, and to effect a special result." To repeat the definition of the invention given in that case, it is "of such a movable press-block as is described, having its edge formed to the side of the rail, in combination with such other blocks as is described, with its edge of similar but reversed form, arranged as described, and combined and operating in the particular way described, for the special purpose of effecting the desired result."

If the claim be thus limited, if such was the invention Cawood made, the use of the Bayonet vise and of the Michigan Southern, cannot, we think, be regarded as an infringement. Both the machines were manifestly copied from the Springfield machine, which we have endeavored to show did not anticipate or contain the principle of Cawood's invention. Each is substantially a vise, and not an anvil. The combination of the blocks is unlike that of the Cawood improved anvil. It is not through the anvil, and the rail when in place for welding and shaping does not rest on the anvil. The iron to be hammered rests upon the jaws, and consequently it is much more liable to displacement than it would be if arranged as described by Cawood. In each only a part of the force of the blows reaches the anvil; for the movable block is supported by an arm attached by a hinge, or by journals, to the base of the block. It is true that by the

change in the shape of the jaws one of the functions of the Cawood machine is secured, — that of preserving the shape of the rail during the process of hammering; but that is only one of the elements of the Cawood. Neither of these two machines can be said to be an improved anvil or swage-block. In neither are the two blocks combined by means of an anvil. In neither is a raised block cast as a part of the anvil. In neither is there any such movable press-block attached to the anvil as is described in the Cawood patent, combined and operating with the other parts of the machine in the manner described. And in neither of them is there any part of an anvil immediately below and fitted to support the rail when in place for being repaired. Each of them has, however, all the parts and substantially the arrangement and combinations of the Springfield machine, and in principle they are identical with it, the only appreciable difference being in the shape of the jaws. If, therefore, they are infringements of the Cawood patent, that patent is void for want of novelty, for it was anticipated by the Springfield. If, on the other hand, the Cawood machine was novel, as we think it was, if it was not anticipated by the Springfield, the conclusion is inevitable, that neither the Michigan Southern nor the Bayonet vise is an infringement.

Much of what we have said is applicable to the Beebee and Smith machine, the use of which the Circuit Court also held to be an infringement of the Cawood patent. To the inquiry, what constitutes an infringement of that patent, it is indispensable to keep in mind what the invention patented is. It is not, we repeat, any mode by which the result sought and obtained is secured, but a machine that attains the desired end by means of described agencies, combined in a described manner and operating in a described way. Thus the patent was considered in 1 Wallace. Now, we think the Beebee and Smith machine, though arriving at the same result, does not profess to attain it by means of the agencies described in the Cawood patent, or any agencies that can be regarded as equivalents combined in the manner described by Cawood, and operating in the same or an equivalent way. True, it is a machine for holding a rail while the exfoliated or crushed end thereof is undergoing reparation, but it performs its functions in a manner

peculiar to itself, unlike the mode in which the Cawood operates. The construction of the two machines is very dissimilar. In the Beebee and Smith there is no fixed block or jaw a part of the anvil. Neither is there any movable block or jaw attached in any manner to the anvil, or connected in any manner with a fixed block or with the anvil. There are two jaws sliding up and down in a V-shaped notch in an anvil entirely unconnected with each other, and kept in place only by their own weight and that of the superincumbent rail. They are not advanced towards each other, or retired by cams or any equivalent mechanism. When by force of gravity they descend into the V-shaped cavity, and thus approach each other, the rail rests upon them and not on the anvil; and when grasped by them, all the force of the blows necessary in welding is expended upon them through the rail, and only remotely upon the anvil. Bringing the jaws together by their gravity cannot be said to be an equivalent for cams or levers, or any other mechanical device. The Beebee and Smith machine, then, has neither such a fixed block nor such a movable press-block as is described in the Cawood machine, nor are the two blocks combined in substantially the same way, and the mode of operation is substantially unlike that described by Cawood. It is impossible, therefore, to hold that its use is an infringement of the complainant's patent.

We do not care to expend much time in refuting the argument of the appellee that a bottom support for the rail in the use of the Cawood invention is injurious, and that it is, therefore, no essential part of the device patented to him. Considerable evidence has been given tending to show that the face of the anvil under the jaws has been chipped off, or cut out, and that thus altered the thing invented works as well, if not better, than it would if the alteration had not been made. In the nature of things, this is impossible, and no amount of testimony can convince us that such is the fact. Manifestly, the chipping off was made to evade the patent. The best mode of using the device would doubtless be to construct the blocks so as to fit exactly the sides of the rail. Thus, its shape and its height would be maintained during the process of hammering and shaping the crown. But this exact fit may not always occur, and whenever it does not, the bottom support on the anvil is of

importance. This is made evident by the fact that when experiments have been made by chipping off the anvil at the bottom of the blocks or jaws, if more than about three-eighths of an inch was removed, it has been found advisable to support the rail by a roller, as in the Cleaveland vise, or by introducing a key. It proves nothing to show that rails may be repaired without any support at their base. Because the invention has been used in an imperfect condition, or altered slightly in one particular without serious loss, is no proof that it was no invention, or that the use of it in its altered condition was no infringement.

It follows, from what we have said, that the decrees must be reversed and set aside, so far as the defendants have been held accountable for the use of the Beebee and Smith machine, or the Bayonet vise, or the Michigan Southern. But so far as the Whitcomb, the Etheridge, the Cawood, or the Illinois Central have been used, the defendants are answerable to the complainant.

We come, then, to the inquiry whether there was error in the ascertainment of the profits made by the use of those devices. This inquiry is exceedingly embarrassed by the very unusual manner of proceeding in the court below. After having determined that the Cawood patent was valid, the court, instead of deciding whether there had been any infringement, by a decretal order referred to a master to find what machines used by the defendants were infringements, and to state an account between the parties. In obedience to this order, the master reported that seven machines used by the defendants infringed the patent, and on that assumption he returned stated accounts. This report the court corrected, holding that one of the seven machines was not an infringement; and sent the case back to the master to report the damages sustained by the plaintiff from the use by the defendants of the other machines, giving him liberty to reconsider his finding as to the cost of fuel and labor in repairing rails on the common anvil and the plaintiff's machine, with liberty also to hear additional evidence, and report such conclusions as might be warranted by the whole testimony. Under this second reference, the master submitted another report, to almost the whole of which exceptions were taken. The court sustained those which

related to the ascertainment of profits made by the defendants, and the measure thereof; and also sustained those which related to the allowance of profits for the use of the complainant's machine by the defendants before he had title to the patent, or any part or interest therein. The effect of this was to set aside the entire report of the master, so far as it stated an account between the parties. That subject was then all at large; and without further reference the court proceeded itself to find the amount of profits the defendants had respectively made by the use of the invention owned by the plaintiff, and found the same to be that for which the final decrees were subsequently entered. The decree in each of the cases was for much less than the master had reported. But how it was made up we are not informed. No account was stated accompanying the decrees. Though the bill prayed for an account, and though an account was decreed, the record shows no account. Nothing in the decree shows us how many rails had been repaired, or what portion of the rails. Nothing in the decree exhibits what was the comparative cost of repairing with the patented machine and with the common anvil. The cases have come to us, therefore, in such a condition that we are called upon to perform the duties of a master. This ought not so to be; and probably we would be justified in reversing all the decrees, and sending the cases back for a statement of accounts. But the litigation has been long protracted, at great expense to the parties; and this consideration has induced us to examine the evidence submitted to the master, and reported by him, in order to discover whether there has been an overestimate of profits in those cases where the defendants used only the machines the use of which was a plain infringement of the Cawood patent. Without entering into details, we are constrained to say, that, in our opinion, there has been no such overestimate. We think the weight of the evidence leads to the conclusion that the number of feet mended on the infringing machines, the gain in mending, compared with the cost of mending on the common anvil (which the court must have determined was about thirty-six cents per foot), considering the saving of labor and fuel, were such as justified the decrees that were made. There are undoubtedly great differences in the statements of

the witnesses, but we think it is not difficult to see where is the preponderance of the evidence. The master's estimate was manifestly too high. We cannot say that of the court was. And, after the action of the court upon the master's first report, it must be presumed that no profits were allowed for any use of the Cawood patent before the plaintiff became its owner.

There is nothing more in these cases that we feel called upon to notice, except the suggestion that repairing railroad rails was unprofitable, compared with what might have been done. It has been argued that it would have been better for these defendants, if, instead of repairing the crushed and exfoliated ends of the rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be re-rolled. Experience, it is said, has proved that repairing worn-out ends of rails is not true economy, and hence it is inferred that defendants have derived no profits from the use of the plaintiff's invention. The argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair their injured rails. They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter, they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage, growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account between a patentee and an infringer of the patent, the question is, not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention.

We will pursue the subject no farther. It follows from what we have said that in those cases in which the defendants have been charged with the profits made from the use of the "Bayonet vise," or the "Michigan Southern" machine, or the "Beebee and Smith" machine, the decrees of the Circuit Court are erroneous; while in the other cases, the defendants having used only the Cawood, or the Etheridge, or the Illinois Central,

or the Whitcomb (the infringing machines), we discover no error. Our judgments, therefore, are as follows: —

In *Illinois Central Railroad Company* v. *Turrill*, and *Michigan Southern and Northern Indiana Railroad Company* v. *Same*,

Decrees reversed, and causes remanded for further proceedings in accordance with this opinion.

In *Chicago and Alton Railroad Company* v. *Same*, *Chicago, Burlington, and Quincy Railroad Company* v. *Same*, and *Pittsburgh, Fort Wayne, and Chicago Railroad Company* v. *Same*,

Decrees affirmed.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE SWAYNE, dissenting.

I dissent from so much of the opinion and judgment in these cases as approves the estimate of damages made by the court below.

PIKE *v.* WASSELL.

Certain lands in Arkansas, liable to confiscation under the act of July 17, 1862 (12 Stat. 589), and belonging to A., a non-resident of the State, were seized Feb. 16, 1865, by the marshal, pursuant to instructions from the district attorney, who, on the 17th of that month, filed a libel of information against them in the proper District Court of the United States. On the following day, a warrant of arrest and monition was issued and duly served. The libel was amended April 5, so as to embrace other lands of A. On that day a decree of condemnation, forfeiture, and sale of all the lands was entered by that court, and they were sold on the 28th of that month by the marshal, under a *venditioni exponas*. The purchasers subsequently conveyed them to B. The decree of condemnation was affirmed by the Circuit Court. A writ of attachment, sued out of one of the courts of Arkansas, March 9, 1865, at the suit of sundry creditors of A., was on that day levied upon the same lands. A., by his attorney, entered his appearance to the suit, and judgment was rendered against him Sept. 29. All of said lands were sold by the sheriff under a *fieri facias*. B. became the purchaser, and refuses to pay taxes upon them, in order that, by buying them at a sale for delinquent taxes, his title may be perfected. A. is still living, and his children brought this suit. *Held*, 1. That the appearance of A. did not discharge the lien of the attachment. 2. That the levy of that writ by the sheriff upon the lands seized by the marshal was void, and that B.'s interest in them is determinable upon the death of A. 3. That the decree of condemnation did not divest the rights of the attaching creditors in the lands not seized by the marshal, and that B.'s title to them in fee, acquired by his purchase at the sheriff's sale, was not affected by the proceedings in

confiscation, and the sale under them. 4. That the affirmance by the Circuit Court of the decree gave no validity to it as against the attaching creditors. 5. That the heirs apparent or presumptive of A. have, in regard to the lands so seized and sold by the marshal, a right to protect their estate from forfeiture or incumbrance, and that B.'s refusal to pay the taxes on them presents a proper case for relief in a court of equity.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. Luther H. Pike for the appellants.
Mr. William M. Randolph for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *Wallach* v. *Van Riswick*, 92 U. S. 207, 208, we decided that after a seizure and an adjudicated condemnation and sale, under the Confiscation Act of July 17, 1862, 12 Stat. 589, of the lands of one engaged in rebellion against the United States, there was "left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another." We also held, p. 213, that the joint resolution passed contemporaneously with the approval of the act, 12 Stat. 627, was "intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death." As to him, the forfeiture was complete and absolute; but the ownership, after his death, was in no wise affected, p. 209, except by placing it beyond his control while living.

A seizure of the property was necessary to give the court jurisdiction for its condemnation. *Miller* v. *United States*, 11 Wall. 294, 296; *Pelham* v. *Way*, 15 Wall. 201; *Brown* v. *Kennedy*, id. 597; *The Confiscation Cases*, 20 Wall. 108. The proceedings in behalf of the United States were commenced by the seizure, and the decree of condemnation and sale, without any doubt, vested in the United States, or the purchaser at the sale, the interest which the person proceeded against had in the property when the seizure was made, free from all intermediate conveyances or incumbrances, whether the result of the voluntary act of the owner or the action of his creditors against him. Whatever interest he had in the property had been seized, as

forfeited to the United States, and placed, pending the suit, beyond his reach, or that of his creditors. All subsequently acquired rights were subject to the prior claim of the United States, if perfected by a decree of condemnation.

In this case, it appears that the United States seized lot 10, nine feet off the east side of lot 9, and two and one-half feet off the west side of lot 11, in block 1, west of the Quawpaw line, and the undivided half of the west half of lots 1, 2, and 8, in block 81, Feb. 16; and on the next day filed their libel of information against this property in the District Court. A warrant of arrest and monition was issued on the next day, and duly served. The lots thus proceeded against were not levied upon under the attachment issued out of the Pulaski Circuit Court until March 9. Consequently, as to this property the attachment was defeated by the decree of condemnation, and the defendants acquired no title through the proceedings in the State court. All the interest they have in it comes through the confiscation sale, and terminates upon the death of Albert Pike, to whom it belonged when seized.

But as to the remainder of the property, there never was any seizure by the United States; and the amendment to the libel, upon which alone the decree of condemnation rests, was made long after the levy of the attachments. When levied upon, therefore, the property was open to attachment; and the subsequent condemnation, without a previous seizure, did not divest the attaching creditors of any rights acquired by their proceedings. As to them, the court had no jurisdiction, because it had never taken the property, and had never issued its warrant of arrest or monition. The affirmance of the decree under the writ of error to the Circuit Court, prosecuted by Albert Pike, operated only upon him. The creditors were no more a party to the proceedings in error than they had been to the original suit.

The appearance of Albert Pike to the attachment suits did not, under the law of Arkansas, discharge the lien of the attachment. No bond was given, such as was required for that purpose. Gould's Dig. c. 17, sect. 15, p. 171; *Delano* v. *Kennedy*, 5 Ark. 459.

It follows, therefore, that the interest covered by the attach-

ment. levied upon the part of the property not seized by the United States has never been confiscated, and that the title which Wassell has since acquired under it may be enforced against the heirs of Albert Pike after his death, notwithstanding the confiscation. It is unnecessary to decide what would have been his rights if a seizure had actually been made by the United States after the attachments.

Our conclusion, then, is, that as to the property actually seized by the United States and condemned by the decree the defendants hold only by virtue of the confiscation sale, but that as to so much as was not actually included in the seizure the defendant Wassell did acquire, by the proceedings in the State court, all the title of Albert Pike at the time of the levy of the attachments.

It only remains to inquire whether the children of Albert Pike stand in such a relation to the property confiscated, and not affected by the attachment proceedings, that they may maintain an action to require the defendants to keep down the taxes during the life of their father.

There can be no doubt but the defendants, as tenants for life, are bound in law to pay the taxes upon the property during the continuance of their estate. *Vamy* v. *Stevens*, 22 Me. 334; *Cairns* v. *Chabut*, 8 Ed. (N. Y.) Ch. 312. This the defendants do not dispute; but they insist that, until the death of the father, the children have no interest in the property, and, therefore, cannot appear to protect the inheritance.

It is true, as a general rule, that so long as the ancestor lives the heirs have no interest in his estate; but the question here is as to the rights which the confiscation act has conferred upon the heirs apparent or presumptive of one whose estate in lands has been condemned and sold. In *Wallach* v. *Van Riswick*, without undertaking to determine where the fee dwelt during the life-estate, we decided that it was withheld from confiscation exclusively for the benefit of the heirs. They, and they alone, could take it at the termination of the life-estate. The children of Albert Pike, as his heirs apparent, are also apparently the next in succession to the estate. Either they or their representatives must take the title when their father dies. If they do not hold the fee, they are certainly the only persons

now living who represent those for whose benefit the joint resolution of Congress was passed. They, at least, appear to have the estate in expectancy. Under these circumstances, as there is no one else to look after the interests of the succession, we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance.

The defendants admit that they have determined not to pay the taxes upon the property. The danger of incumbrance by reason of this failure to perform their duties as tenants for life is, therefore, imminent, and the case a proper one for a court of equity to interfere and grant appropriate relief. In *Cairns* v. *Chabut*, *supra*, when the tenant for life failed to keep down the taxes, an order was made for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off and discharge the amounts then in arrear. We see no reason why similar relief may not be granted in respect to the accruing taxes, in case the tenants fail to perform their duties in that behalf; but, without undertaking to direct specifically as to the form in which the protection asked shall be secured, we shall reverse the decree, and remand the cause to the Circuit Court, with instructions to proceed in conformity to this opinion, as law and justice may require; and it is

So ordered.

MEMPHIS v. BROWN.

A., having a decree against the city of Memphis for the payment of money, obtained, by judgment rendered March 30, 1875, a *mandamus*, directing her, for the payment of the decree, to levy a tax upon all the taxable property of the city. She thereupon passed an ordinance levying a special tax of fifty-four cents "on the $100 worth of property." Under the laws of the State, taxable real and personal property, other than merchants' capital, is embraced in one tax-list, and merchants' capital in another. A., finding that such capital was not subjected to the special tax, although it was to that levied for all other purposes, and that the required sum would not be raised, moved for a further peremptory *mandamus*, requiring such capital, as it was assessed for other purposes in the year 1875, to be included in the property to be taxed for his benefit. Such *mandamus* was directed by judgment March 2, 1876. On the 20th of the following May, the city moved to set aside the latter judgment; but the court refused to grant the motion, and re-entered, on that day, the judg-

ment as the final judgment in the premises. Thereupon the city, within due time, sued out a writ of error, and gave the necessary bond. *Held*, 1. That the court had the right to set aside the judgment of March 2, during the term at which it was rendered, and to re-enter it as of the date when the motion to set it aside was made. 2. That the writ of error was properly sued out on the re-entered judgment, and is a *supersedeas*.

ON motion, 1. To dismiss a writ of error to the Circuit Court of the United States for the Western District of Tennessee. 2. To vacate the *supersedeas*.

Brown obtained a decree in the Circuit Court of the United States for the Western District of Tennessee against the city of Memphis for $292,000, in conformity with the opinion of this court in the case reported in 20 Wall. 289.

Upon his petition, that court ordered, March 30, 1875, the issue of a peremptory writ of *mandamus* against the city, directing the levy of a tax for his benefit upon all the taxable property of the city. Under the laws of Tennessee, taxable personal and real property, other than merchants' capital, is embraced in one tax-list, and merchants' capital in another. In March, 1876, Brown discovered that the tax-collector, pursuant to an ordinance passed by the city Dec. 10, 1875, levying "a special tax of fifty-four cents on the $100 worth of property," was collecting the tax levied for his account on personal and real property, but not on merchants' capital, although the city, for all other purposes, was collecting a tax on merchants' capital.

It appearing that the tax upon the personal and real property alone would not be sufficient to raise the required sum, a motion was made in the original suit by Brown for a further peremptory *mandamus*, requiring the city to include in the property to be taxed for his benefit the taxable merchants' capital, as returned and assessed for taxation for other purposes in the year 1875. This motion was granted March 2, 1876, and a judgment entered accordingly. Afterwards, during the same term, May 20, the city appeared and moved the court to set aside the order of March 2; but this motion was refused, and that order re-entered as the final judgment of the court in the premises. A writ of error was sued out upon this last judgment, and a *supersedeas* perfected, by giving the required bond within sixty days thereafter.

Mr. P. Phillips and *Mr. W. M. Randolph* in support of the motions.

By art. 2, sect. 28, of the Constitution of the State of Tennessee, all property is taxable. No one species is to be taxed higher than another of equal value, and all taxation is to be equal and uniform throughout the State.

The judgment of March 30, 1875, requiring that the tax should be levied on all the taxable property of the city, was rendered in a direct proceeding, to which the city was a party.

The subsequent orders were mere declarations of what that judgment contained, and to neither of them does error lie.

The only judgment which can be reviewed is that of March 30, 1875, which settled definitively the rights of the parties, and to which the city may now prosecute a writ of error. Her right to do so demonstrates that the present writ cannot be sustained.

The *supersedeas* is only to the order of May 20, 1876. Neither the judgment of March 30, 1875, nor the order of March 2, 1876, is affected by the present proceedings.

It is very evident that, if either March 30, 1875, or March 2, 1876, be adopted as the day on which the final determination was had, the *supersedeas* cannot be maintained, as more than sixty days from either date had elapsed before the filing of the writ and bond.

Mr. W. Y. C. Humes, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think that the order made by the Circuit Court, May 20, 1876, upon the motion to subject merchants' capital to the tax was such a final judgment as may be brought here for re-examination by a writ of error. The precise question decided by that order had never before been presented in the cause. The city was then for the first time required, in express terms, to subject this particular class of property to the adjudged taxation. The writ was, therefore, properly sued out upon the judgment.

Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of

March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a *supersedeas*. *Sage et al.* v. *Central Railroad Company of Iowa et al.*, 93 U. S. 412. As the writ was issued on the day of the order, and its allowance embraced in the entry recording the order itself, there cannot be any doubt of the intention of the court to give the judgment at that time such an effect. *Motions denied.*

CHESAPEAKE AND OHIO RAILROAD COMPANY *v.* VIRGINIA.

1. The charter of the Chesapeake and Ohio Railroad Company does not exempt from taxation that portion of the road of the company between Richmond and Covington.
2. A railroad corporation, formed, under an act of the legislature, by the consolidation of existing companies, and "vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The Chesapeake and Ohio Railroad Company was incorporated in the year 1868, by the action of joint commissioners of Virginia and West Virginia, in pursuance of the legislation of those States. The object of the incorporation was to construct a railroad from Covington in Virginia, through their territory, to the Ohio River. The Virginia Central Railroad Company was then operating a continuous line from Richmond to Covington, composed of the Blue Ridge road and of its own road, running westward until it connected with that road, which was the property of the State, and so used by arrangement with the State.

The extension of railroad communication between Covington and the Ohio River, through territory then all her own, had been some time before undertaken by Virginia, and a large amount of money and labor expended on the enterprise by the State Board of Public Works, operating as a corporation styled the Covington and Ohio Railroad Company; but the work had been arrested by the war in 1861.

Subsequently, West Virginia was taken from Virginia by a line which cuts the proposed route some sixteen miles west of Covington, leaving within the limits of Virginia about two hundred and eight miles of completed road from Richmond to Covington, and about sixteen miles beyond Covington, over which the road was yet to be constructed. The distance from Covington to the Ohio, over which the road was to be carried, is about two hundred and fifteen miles.

After the separation, Virginia passed an act, approved Feb. 26, 1866, by which any responsible capitalists, who would accept the benefits of the charter thereby created, and become organized according to its terms, should constitute a corporation under the same style of the Covington and Ohio Railroad Company. When fully organized, the company was to have "all the rights, interests, and privileges of whatever kind, in and to the Covington and Ohio Railroad, and appurtenances thereto belonging, now the property of the State, upon condition that it shall, within six months after its incorporation, as provided in the tenth section of this act, commence, and within six years complete, equip, and operate a railroad, from some point at or near Covington in Alleghany County, Virginia, and connecting with the Virginia Central Railroad, by the way of the White Sulphur Springs and the valleys of Greenbrier River, New River, and Kanawha River, to a point at or near the mouth of Scary Creek, and thence to the Ohio River." "But this grant is not intended to include the unexpended amount appropriated by the State of Virginia to this work."

It further provides, "that the rates of charge by said company for passengers and freight transported on the main line and branches shall never exceed the highest allowed by law to other railroads in the State of Virginia, and no discrimination shall be made in such charges against any connecting railroad

or canal company in which the State has an interest, and no taxation upon the property of the said company shall be imposed by the State until the profits of the company shall amount to ten per cent a year on its capital."

Commissioners were appointed by the act (and, if a like number should be appointed by West Virginia, the whole were to act in conjunction), "to offer the benefits of the charter for the acceptance of capitalists, to insure the speediest and best construction, equipment, and operation of said railroad. To this end they are hereby empowered to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility, and to introduce into the said contract such additional stipulations for the benefit of the State, and in furtherance of the purposes herein declared, and not inconsistent with this act; which said contract shall be, to all intents and purposes, as much a part of this charter as if the same had been herein included at the time of the passage of this act." Virginia Session Acts, 1865–66, p. 317.

This act was, March 1, 1866, met by corresponding legislation on the part of West Virginia, and the benefits of the charter were offered to capitalists by the joint commissioners of the States, but not accepted; and no company was ever organized as contemplated under the authority of the laws so passed.

Afterwards laws were passed by the States for the further encouragement of the enterprise, by which the Covington and Ohio Railroad Company, when organized under the preceding acts, was authorized to consolidate with the Virginia Central Railroad Company, and other companies named (all or either of them), upon terms to be agreed upon between them. The companies thus consolidated were to constitute one corporation, to be vested with all the rights, privileges, and franchises, and property which may have been vested in either company prior to the act of consolidation, the new corporation to be known as "The Chesapeake and Ohio Railroad Company." The new company was further authorized, within two years after its organization, to purchase the stock held by the State in the company, and also the right of the State in the Blue Ridge Railroad. Further, it was provided, that "The Virginia Central Railroad Company may contract with the Covington and

Ohio railroad commissioners for the construction of the railroad from Covington to the Ohio River; and, in the event such contract be made, the said Virginia Central Railroad Company shall be known as the Chesapeake and Ohio Railroad Company, and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad Company, and to all the rights, interests, and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized." Acts of Virginia, 1866–67, p. 705.

The contract thus authorized to be made between the joint commissioners and the Virginia Central Railroad Company, was made by them on the 31st August, 1868; and it is a conceded fact, that the exemption from taxation provided for in the acts hereinbefore referred to was held out to the Virginia Central Railroad Company by the commissioners appointed by said acts as one of the inducements to the company to unite in the contract with them for the construction of the railroad from Covington to the Ohio River, it being supposed by said commissioners and the Virginia Central Railroad Company that such exemption would apply to the whole line from Richmond to the Ohio River.

Under this contract the Chesapeake and Ohio Railroad Company was duly organized. It took the interest of the State in her uncompleted work on the line west of Covington, and constructed and equipped a railroad thence to the Ohio River, according to its charter; and, within two years after its organization, purchased the Blue Ridge Railroad from the State, and has ever since operated a continuous line of road from Richmond to the Ohio River.

The profits of the company have never amounted to ten per cent per annum on its capital.

Certain proceedings, under the assessment and tax acts of Virginia, were instituted in the Circuit Court of the City of Richmond, against the company, for failing to report to the auditor of public accounts, on the first day of February, 1871, the estimated value of its real and personal property of every description; and for failing, also, to report quarterly, on the first day of February, May, August, and November, of that year, the net earnings of the road for the preceding three months;

and for failing to pay the taxes imposed thereon by law into the treasury at the time fixed for making said report.

The company contended that those acts did not apply to it; and, if they did, that they were in violation of the tenth section of the first article of the Constitution of the United States, as by the charter no taxation was to be imposed upon its property until its profits should amount to ten per cent a year upon its capital. The court sustained the claim of exemption set up by the company, and dismissed the proceedings. The judgments of that court were reversed by the Supreme Court of Appeals of the State of Virginia; whereupon the company brought the cases here.

Mr. William M. Evarts and *Mr. William J. Robertson* for the plaintiff in error.

Mr. R. T. Daniel, Attorney-General of Virginia, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

Each of these cases presents the same question. That a contract for some exemption from taxation was made by a legislative offer of the State, and an acceptance of the offer by the company, is not controverted; but the extent of the exemption is the matter in question between the parties. To ascertain what that was, it is necessary to review the legislative acts which made the offer accepted by the company. Preparatory to such an examination, it may be well, also, to notice some antecedent facts stated in the record.

On the fifteenth day of February, 1858, an act of the legislature of Virginia was passed, authorizing the board of public works of that State to construct a railroad from Covington to the Ohio River, on State account, under which act the construction was commenced and prosecuted by means of State appropriations, made from time to time, until the work was arrested by the late civil war. The completion of the road, however, was deemed an object of great importance to the people of Virginia, and on the 26th of February, 1866, an act was passed, entitled "An Act to incorporate the Covington and Ohio Railroad Company," the provisions of which we shall presently notice. The State having then been divided, the legislature of West Virginia, to which State the road was deemed equally

important, a few days afterwards passed a similar act, also entitled "An Act to incorporate the Covington and Ohio Rail road Company." The object of both these statutes was the completion of the same road by one and the same corporation. The act of Virginia declared that the persons upon whom the benefits of the charter might thereafter be conferred, and who might be organized as thereinafter provided, should thereupon be constituted a corporation, under the name of "The Covington and Ohio Railroad Company," and should have all the rights, interests, and privileges in and to the Covington and Ohio Railroad, and its appurtenances, then belonging to the State of Virginia, on certain conditions, not now necessary to be noted. By the seventh section of the act, the State reserved a right to connect, at any point within its limits, with the railroad of the said company, or any of its branches, any canal or railroad in which the State had an interest; and the section declared that "no taxation upon the property of said company shall be imposed by the State until the profits of the company shall amount to ten per cent a year on its capital." The ninth section appointed five commissioners, to act in conjunction with an equal number who might be appointed by West Virginia, whose duty it was made to offer the benefits of the charter to capitalists, so as to secure the speediest and best construction, equipment, and operation of the railroad. To this end they were empowered to contract with any parties, and to introduce into the contract any additional stipulations for the benefit of the State, in furtherance of the purposes declared, and not inconsistent with the act. And it was further enacted, that such contract should be to all intents and purposes as much a part of the charter as if it had been included in the act at the time of its passage.

The act of Feb. 26, 1866, proved ineffectual. The Covington and Ohio Railroad Company was not formed. The commissioners were unable to find parties able and willing to accept the charter, and contract with them on the terms proposed by it. Accordingly, on the 26th of February, 1867, the legislature of West Virginia, and on the 1st of March, 1867, the legislature of Virginia, each passed another act, entitled

An Act to provide for the completion of a line or lines of rail-

road from the waters of the Chesapeake to the Ohio River." The two acts were of like import. That of Virginia, as well as that of West Virginia, held forth two alternative propositions. The first was, that the Covington and Ohio Railroad Company, which might be organized under the first act, might consolidate with the Virginia Central Railroad Company, the South-Side Railroad Company, and the Norfolk and Petersburg Railroad Company, or with one or more of them; the consolidated companies constituting one corporation, to be known as the Chesapeake and Ohio Railroad Company, and to have a capital not exceeding $80,000,000. The act also contained some new provisions respecting the organization of the Covington and Ohio company. The second section gave to the consolidated company, in case consolidation should be effected, all the rights, privileges, and franchises and property which might have vested in either company prior to the act of consolidation. The fourteenth section authorized the new, the consolidated company, to purchase stocks held by the State, to pay debts due to the State from either of the companies named, and to purchase the Blue Ridge Railroad, belonging to the State, by the surrender of State bonds equal in amount to the stocks purchased, the debts paid, and the valuation of the Blue Ridge Railroad, respectively. Such was the first alternative proposition.

The second was made to the Virginia Central Railroad Company alone, and it was made in the fifteenth section of the act, which is as follows: —

"The Virginia Central Railroad Company may contract with the Covington and Ohio Railroad commissioners, for the construction of the railroad from Covington to the Ohio River; and, in the event such contract is made, the said Virginia Central Railroad Company shall be known as the Chesapeake and Ohio Railroad Company, and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests, and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized."

No such consolidation as that proposed by this statute ever took place. It was impossible, because the Covington and Ohio Railroad Company never came into existence. But the second alternative proposed was accepted. The Virginia Central did

enter into a contract with the railroad commissioners, as authorized by the fifteenth section, and thus became the Chesapeake and Ohio Railroad Company. By the contract, it undertook to construct the unfinished railroad; and the commissioners, on behalf of the State, engaged that it should be "entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests, and privileges, which, by the statute aforesaid, were conferred upon the Chesapeake and Ohio Railroad Company when organized." The statutes referred to were those passed by the legislatures of Virginia and West Virginia in 1866 and 1867, which we have mentioned.

Thus the contract between the State and the company was formed, and such were its terms. The question now is, How far did the contract exempt the property of the Virginia Central (now the Chesapeake and Ohio) Company from taxation, or rather what property did it exempt?

This is to be answered in view of the statute alone. The contract with the railroad commissioners made no attempt to confer upon the company any greater or other rights, privileges, or immunities than those described in the statutes. By virtue of it, the company obtained two classes of rights: First, the benefits which the act of Feb. 26, 1866, amended by the act of 1867, would have conferred upon the Covington and Ohio Railroad Company had it been formed; and, second, the rights, interests, and privileges of the corporation contemplated by the first alternative proposition — namely, the corporation formed by consolidation of the companies mentioned — would have possessed had such consolidation been made. What, then, were those rights, benefits, interests, and privileges? The Covington and Ohio Company, had it been formed, would have been exempt from all State taxation of its property; but its charter gave exemption to no other property. Had a consolidation taken place between it and the Virginia Central, and had the two companies become one corporation, together owning the property of both, that portion of the property brought by the Covington and Ohio into the aggregate would have continued exempt. But exemption of other property was not contemplated by the charter. So much is settled by repeated decisions of this court. *Philadelphia, Wilmington, & Baltimore*

Railroad Co. v. *Maryland*, 10 How. 877; *The Delaware Railroad Tax Case*, 18 Wall. 206; *Tomlinson* v. *Branch*, 15 Wall. 460; *Central Railroad and Banking Co.* v. *Georgia*, 92 U. S. 665. In most, if not in all, of these cases the statutes which authorized the consolidation or union of the companies declared that the consolidated or united companies should possess all the rights and privileges which each of the companies enjoyed under its charter. Yet, it was ruled that those rights and privileges did not extend beyond that portion of the aggregated property which each had held under its charter.

There was no express provision in either of the statutes that the property of the Virginia Central shall, in any contingency, be exempt from taxation, and certainly, in our opinion, nothing they contain raises an implication of such an exemption. What was exempted was that which the legislature provided might be the property of another company. The right or immunity of that company was a limited right or immunity, and the Virginia Central, when it acquired it, took it with its limitations.

Nor was there any thing in the grant to the Virginia Central, made by the contract under the fifteenth section of the act of 1867, of all the rights, interests, and privileges which by that act were conferred upon the Chesapeake and Ohio Railroad Company when organized (that is, upon the Chesapeake and Ohio, if such a company should be formed by consolidation), from which can be inferred an exemption from taxation of any thing except what would have been brought into the common stock, if the proposed Covington and Ohio Company had been organized, and had become a party to the consolidation. The consolidated corporation would have acquired, as we have seen, no greater immunities from taxation than the constituent companies had prior to the union, and would have held them distributively; that is to say, whatever privileges and advantages either of them possessed would have been held by the new company to the extent of the road occupied by each respectively upon the consolidation. It would have stood in their place, and have possessed the powers, rights, privileges, and immunities the constituent companies had severally enjoyed in the portions of the road which had previously belonged to them.

If it be asked, why, then, were the rights of the consolidated

Chesapeake and Ohio conferred upon the Virginia Central, if they were only such as the Covington and Ohio had, — those rights having been granted by the other provision of the statute and of the contract, — the answer is at hand. By the fourteenth section of the act, other rights were promised to the consolidated corporation when organized. We have already called attention to them. Among them was the right to pay the debts of the several companies, and buy the State stock therein with State bonds, and the right to buy the Blue Ridge Railroad; and thus acquire a continuous line of railroad from Richmond to the Ohio River. All these rights passed to the Virginia Central; but none of them had any reference to exemption from liability to taxation of any property other than that which would have belonged to the Covington and Ohio Railroad Company had it come into existence.

No doubt the extension of a railroad from Covington to the Ohio River was a favorite project of the State; and it was intended to offer terms which, it was supposed, would induce the Virginia Central Company to undertake its construction; but what the terms were must be gathered from the acts of the legislature, and from the contract with the railroad commissioners.

In the agreed statement of facts, it appears that the exemption from taxation provided for in the statutes was held out to the Virginia Central by the railroad commissioners, as one of the inducements to enter into the contract to construct the road, it being supposed by the commissioners and by the company that the exemption covered the whole line from Richmond to the Ohio River. This fact, however, can be of no importance to the decision we feel constrained to make. No such stipulation was inserted in the contract; and even if such a representation was made to the company, it was but the expression of an opinion respecting the meaning of a statute, in regard to which the company had the same knowledge that the commissioners had.

It will be seen from what we have said, that, in our opinion, the Court of Appeals of Virginia construed the acts of 1866 and 1867 correctly, and that no attempt has been made to impair the obligation of a contract. *Judgment affirmed.*

BLAKE v. ROBERTSON.

ROBERTSON v. BLAKE.

1. Reissued letters-patent No. 2,145, granted to Eli W. Blake, Jan. 9, 1866, for an improvement in machines for crushing stones, and extended June 15, 1872, were not anticipated by those granted Sept. 4, 1849, No. 6,690, to Hobbs & Brown, for crushing ice, nor by those granted Jan. 8, 1854, No. 10,365, to James Hamilton, for an ore-crusher.
2. The court sustains the validity of said letters-patent to Blake, and finds that they have been infringed by the respondent.
3. In an action for the infringement of letters-patent, damages must be proved, and the burden of proof is upon the complainant.
4. In this case, no license fee charged by the complainant is shown, although it appears that he made a profit of forty dollars per inch on the width of the jaws of the machines sold by him. They, however, embraced inventions covered by patents other than that for the infringement of which this suit was brought. *Held*, that, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, he is entitled to nominal damages only against the respondent.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

The facts are stated in the opinion of the court.

Mr. H. T. Blake for Blake.

Mr. B. E. Valentine, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

These are cross-appeals in the same cause. Both involve questions in mechanics. These being determined, the legal propositions which apply are so well settled as to admit of no controversy.

A patent was granted to Blake on the 15th of June, 1858, by the United States, for a stone-breaker. On the 9th of January, 1866, the same authority reissued the patent to him, with amended specifications. It was extended on the 15th of June, 1872. The bill in this case is founded upon the latter patent. It charges infringement.

The answer avers that the machine described is of no practical utility, denies the novelty of the invention, and also the alleged infringement.

The description in the specification sets forth three things as the essential characteristics of the machine: —

1. Two jaws, within which the stones are to be broken. Their faces are to be so nearly in an upright position that the stones will descend between them automatically. The jaws are to be so far convergent that the interspace at the top will be sufficient to receive the stones, and that at the bottom only such as will allow the fragments to escape when broken of the required size.

2. A revolving shaft, driven by steam or other motive power, imparting to one of the jaws a continual vibratory movement, causing it alternately to approach toward and recede from the other jaw, through a short and definitely limited space, so that, when a stone is put in, the movable jaw will advance and crush it, then, receding, liberate the fragments, which again descend, and, if too large, are rearrested and crushed again; and so on, until the fragments have passed out through the open space at the bottom. The distance between the jaws is to be adjustable at pleasure, so that the stone can be broken of any desired size.

3. A fly-wheel is combined with the revolving shaft and movable jaw, for the purpose of rendering the strain upon the power more equal.

The claim is for —

A combination of a stone-breaking machine of upright converging jaws with a revolving shaft and mechanism imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating as set forth.

The combination in a stone-breaking machine of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating as set forth.

In combination with the upright converging jaws and revolving shaft imparting a definitely limited vibration to the movable jaw, so arranging the jaws that they can be set at different distances from each other at the bottom, thus producing fragments of every desired size.

A moment's glance at the model furnishes a sufficient answer to the objection of the want of practical value. It would be passing strange if a machine of that character could have gone

through the severe conflicts of litigation which this patent has encountered, and have come forth victorious from every contest. It has proved equal to every ordeal to which it has been subjected. The number sold by the complainant, as shown by the record, is conclusive upon the subject.

The patent to Hobbs & Brown of the 4th of September, 1849, and the patents to Hamilton of the 30th of January, 1854, and the 5th of January, 1855, antedate the patent to Blake. It is insisted that each of them is for a machine substantially the same with the one described in Blake's patent, and that they are fatal to his claim of the requisite novelty of his alleged invention.

The machine of Hobbs & Brown is for "improvements in the application of well-known mechanical means for the purpose of crushing ice." . . . The "improvements consist in applying a hopper with one diagonal fixed side and two parallel sides, to contain the ice, and compressing the ice by a movable fourth side, the fixed diagonal side and moving side having within them dental projections cut or cast on, to operate downward and prevent the ice from rising in the hopper when compressed, and also to enter and split the ice."

The machine is operated "by the combination with these parts of a lever fitted with an eccentric or cam-formed point."

There is in this description neither of the ingredients nor the compound of the Blake machine. Every element and the combination are wanting. There is no mention of the converging adjustable jaws, of the revolving shaft, nor of the fly-wheel. The differences are as marked in the mode of operation as in the structural elements of the machine.

The Hobbs & Brown machine does its work by the downward and sweeping movement of the jaw, and the grasping and splitting by the teeth. The motive power is supplied and applied by a hand-lever, which gives a motion irregular, and varying with the varying exigencies of the ice during the process to which it is subjected.

The Blake machine performs its functions by the short, regular, and unvarying vibrations of the smooth-faced adjustable jaw, driven without intermission by the revolving shaft.

It is obvious that the Hobbs & Brown machine could not be

applied with effect to the purpose of breaking stones, without essential changes of principle and details.

Hamilton's machine was "for crushing and grinding quartz or other substances."

In the specification annexed to his original patent, he says: —

"My invention consists in the use of a cylindrical nut or pestle in a similarly formed basin, the pestle having a partial rotary and crushing motion communicated to it by means of a lever attached thereto.

"'*A*' is a basin, the lower part of which is made circular, and the sides parallel to each other. '*b b*' are flat ends or heads secured to the basin by bolts.

"'*C*' is the shaft carrying the cylindrical pestle, '*d*.'

"'*E*' is a lever attached to or formed with the pestle '*d*,' the upper end being connected by a joint '2' to '*a*' pitman, passing to a crank, eccentric, or other suitable mechanical contrivance, to give the arm '*E*' an oscillating movement, and the pestle a partial rotary motion on its shaft '*C*.'"

The claim of this patent is for "the means herein described and shown for crushing and grinding metallic ores, consisting of the cylindrical pestle, '*d*,' provided with grooves in its upper part to crack the lumps of ore, and set on a shaft, '*C*,' on which it has a partial rotary motion, and operating in connection with the basin, '*A*,' in which said pestle moves to grind the ore into powder by the gradual approach of the sides of said basin to the cylindrical pestle, said pestle being also provided with a scraper or agitator, '5,' in its lower surface, to operate as specified."

The second patent is declared to "consist in providing means for keeping the pestle down with sufficient force to pulverize the material operated on, and also to prevent the pestle from grinding too finely; *i.e.*, to furnish material for simply cracking the ore or other material into small lumps of any desired size, instead of grinding the same to a powder, thereby adapting the machine to different characters of metallic ores or other substances."

We have here no reflex or embodiment of either of the ideas that found expression in the Blake machine. The converging jaws, the revolving shaft, and the fly-wheel, are all wanting, as

in the Hobbs & Brown machine. Instead, there is a cylindrical nut or pestle, having a partial rotary and crushing motion communicated to it by means of a lever attached thereto. The pestle rotates on a central axis within an eccentric concave. The work is done by this pestle. There is nothing of the vibratory motion of a movable jaw, alternately advancing and receding, as in the Blake invention.

The difference is not that of mere mechanical equivalents. It is radical, and goes to the essence of the organisms. These considerations are so obvious, that further remarks upon the subject are unnecessary.

The proofs show that but two of the Hamilton machines were ever made. Practically, the invention was abandoned.

This brings us to the question of infringement.

There are numerous points of similarity, and, indeed, of identity, in the respondent's machine, which are not controverted. It is for breaking stone. It has two upright jaws for this purpose, one fixed and the other movable. The jaws converge. The breaking is effected by the convergence. The movable jaw alternately approaches towards and recedes from the fixed one. This movement is produced by a short and powerful vibratory motion communicated by a revolving shaft, with a fly-wheel upon it. There is an opening at the upper end of the jaws, where the stones are received, and one below, where they are discharged.

The only point of diversity insisted upon by the respondents, is, that the vibratory movement in the Blake machine is limited and unvarying, while in the machine of the appellants it is not of this invariable character.

In the Blake machine, the movable jaw receives its movement from the revolving shaft, through iron rods and levers. In the respondent's machine, it is communicated from the revolving shaft, through a confined column of water.

In the appellant's model, the revolving shaft is not shown. In their machine, it works the plunger of the pump, from which the water is conveyed to a cylinder behind the movable jaw, whence it is applied to that jaw by means of a ram, the ram taking the place of the piston in an ordinary engine. Thus the vibrating arm, the toggle, the toggle-joint, and the pintals

in the Blake machine are dispensed with, and their place supplied by the hydraulic arrangements we have described.

What is so employed in the appellant's machine is the obvious and exact equivalent of what is so dispensed with in the Blake machine. The liability of the packed joints to leakage is a serious objection to such use of water. Any considerable leakage would stop the machine. It could not be used while that condition existed. Constant care and vigilance are necessary in such cases to prevent the frequent occurrence of this evil. Water does not escape from a safety-valve with the same celerity or effect as steam.

The Blake machine has a decided advantage, in the greater simplicity and cheapness of its equivalents.

It is difficult to resist the conclusion that the change had no motive or purpose but evasion.

If there be no extraneous obstruction, the vibratory motion will be exactly the same in both cases. If there be such obstruction, the safety-valve in the appellant's machine might possibly be brought into use with good effect. But if this were so, the valve would be only an addition and an improvement of the machine. The valve, therefore, is, in any view, quite immaterial to the inquiry we are pursuing.

Where an original machine and an improvement upon it are both patented, neither patentee can use what does not belong to him, without the requisite authority from the owner. The appellants having embodied all the ideas of Blake's invention in their machine, the valve which supplemented it, whether good or bad, is outside of the case, and cannot affect the result.

We think the infringement is clearly made out.

It remains to consider the question of damages. A few remarks upon that subject will be sufficient.

The proof is meagre and indefinite.

The infringers made but four machines.

No license fee charged by the complainant is shown. The burden of proof rests upon him. Damages must be proved; they are not to be presumed. The complainant made a profit of forty dollars an inch on the width of the jaws of the numerous machines he had sold.

But inventions covered by other patents were embraced in

those machines. It was not shown how much of the profit was due to those other patents, nor how much of it was manufacturer's profit. The complainant was, therefore, entitled only to nominal damages. This the court gave him. It was all the state of the evidence warranted. It would have been error to give more.

Decree affirmed, and the costs of each appeal are adjudged against the party taking it.

JEROME v. McCARTER.

1. Prior mortgagees are not necessary parties to the bill of a junior mortgagee, which seeks only the foreclosure or the sale of the equity of redemption.
2. Neither the mortgagor nor his assignee in bankruptcy can object to the order in which the priority of valid and subsisting liens on the mortgaged premises is fixed by the decree of foreclosure.
3. The subsequent bankruptcy of the pledgor of a negotiable instrument does not deprive the pledgees of their right to dispose of it upon his default.
4. An objection that leave was not given to file the bill of foreclosure, — the mortgaged premises being at the time in the possession of a receiver appointed in a former suit in the same court, — if, under any circumstances, available, will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared, answered it, and cross-examined the witnesses of the complainant.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is fully stated in the opinion of the court.

Argued by *Mr. Matt. H. Carpenter* and *Mr. George Norris* for the appellants.

Mr. George F. Edmunds and *Mr. Alfred Russell, contra.*

Mr. JUSTICE STRONG delivered the opinion of the court.

There are no less than twenty-seven assignments of error in this case, but the subjects of real controversy are few. The bill is an ordinary one for the foreclosure of a junior mortgage covering the canal and franchises of the Lake Superior Ship Canal, Railroad, and Iron Company, and covering also two separate bodies of land, each containing two hundred thousand acres. The mortgage was given expressly subject to two prior

mortgages, one, dated July 1, 1865, upon the canal and one of the bodies of land, and the other, dated July 1, 1868, upon the canal and the other body of two hundred thousand acres of land. Each of these prior mortgages was made to secure the payment of the company's bonds of even date therewith, amounting to the sum of $500,000; and all the bonds were issued, and they are now outstanding. The first of these prior mortgages is known as the Sutherland mortgage. Default having been made in the payment of interest upon the bonds secured by that, John L. Sutherland, the trustee, filed his bill to foreclose it, making all the subsequent mortgagees parties; and they all appeared. In that case, Isaac H. Knox was appointed receiver of all the property covered by the several mortgages, and subsequently, in order to obtain the money necessary for completing the canal by order of the court, he was authorized to create, issue, and sell certificates of indebtedness to the amount of $500,000, to be secured by a mortgage, which he was empowered to make, covering all the property, and which was to be prior in right to all other mortgages. Pursuant to this authority, the receiver did issue and sell such certificates, and for their security executed the mortgage directed by the court. These certificates are now all outstanding.

Such was the condition of affairs when the present bill was filed. But the company having afterwards gone into bankruptcy, a supplemental bill was exhibited making the assignees in bankruptcy parties defendant; and they appeared and made defence, and they are the only parties appellant.

It is now contended, on their behalf, that the bill cannot be sustained, because the prior mortgagees were not made parties. This position cannot be sustained. It is undoubtedly true there are cases to be found in which it was ruled that prior incumbrancers were necessary parties to a bill for the foreclosure of a junior mortgage, but in most of these cases the circumstances were peculiar. Where the effort of the junior mortgagee is to obtain a sale of the entire property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrancers parties, for they have an immediate interest in the decree. And so, when there is sub

stantial doubt respecting the amount of the debts due prior lien creditors, there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing. But the case in hand has no such peculiarities. The prior mortgages were not due when this bill was filed; and, without the consent of those mortgagees, nothing more than the equity of redemption could be sold under any decree made in the case, or under the decree which was sought. Nor is there any doubt entertainable respecting the amount due under the prior mortgages. Indeed, the company is estopped by the provisions of its mortgage, of which the complainant is trustee, from asserting that the entire amount of the two $500,000 mortgages, and of the receiver's mortgage, was not outstanding when the present mortgage was made. The full indebtedness was acknowledged by making the junior mortgage expressly subject to it, and as there is no evidence that any portion of it has been paid, it is not admissible for the mortgagors or their assignees in bankruptcy to deny it now. *Bronson* v. *The LaCrosse & Milwaukee Railroad Co.*, 2 Wall. 283.

Apart from the exceptional cases, we understand the general rule to be, that, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. So it has been held in England in *Rose* v. *Page*, 2 Sim. 471; *Richards* v. *Cooper*, 5 Beav. 304; *Delabere* v. *Norwood*, 3 Swanst. 144.

Such, also, is the rule asserted in this country, where the bill of a junior mortgagee, as in this case, seeks only a foreclosure or sale of the equity of redemption. Edwards on Parties, p. 91, and cases cited; *Gihon* v. *Bellville*, 3 Halst. (N. J.) Ch. 531; *Williamson* v. *Probasco*, 4 id. 571.

The subject has been under consideration by this court in *Hagan* v. *Walker et al.*, 14 How. 37, in which it was shown that it is not necessary in all cases to make a prior mortgagee a party. And it is not easy to see why it should be in any case, when the decree asked cannot injure or affect him. In *Payne* v. *Hook*, 7 Wall. 432, it was said, "It can never be indispensable to make defendants of those against whom nothing is alleged, and from whom no relief is asked." See also *French* v.

Shoemaker, 14 Wall. 815. We think this is the correct rule. It is certainly consonant with reason, and we see nothing in the present case that justifies a departure from it. We hold, therefore, that the bill is not defective for want of proper parties.

The appellants next contend that the decree is erroneous, because the mortgagors were declared bankrupt after the bill was filed, and before the decree was entered; and it is urged that the bankrupt court had absolute and exclusive jurisdiction, and was entitled to the entire administration of the bankrupts' property. That this objection is without merit was shown in *Marshall* v. *Knox*, 16 Wall. 551, and *Eyster* v. *Gaff et al.*, 91 U. S. 521, to which we need only refer.

A further objection insisted upon is, that while the property was in the charge of a receiver appointed in the suit brought by Sutherland to foreclose the first mortgage, and therefore, as it is said, was *in custodia legis*, this bill was filed without leave of the court. If there could, under any circumstances, be any force in this objection, there is none now. Both suits were brought in the same court; these appellants appeared, answered, and cross-examined witnesses, and made no allegation that the suit had been brought without leave until about a year and a half afterwards. It was then too late. They must be held to have acquiesced; and, if not, leave of the court to commence and prosecute the suit must be presumed after the orders made to facilitate its progress.

The only remaining assignments of error that require particular notice relate to the ascertainment of the liens on the property of the company anterior to the mortgage now in suit, to the determination of their relative priority, and to the adjudication of the amount of the debt for the payment of which that mortgage is a security. The court decreed not only that the two five hundred thousand dollar mortgages, one dated July 1, 1865, and the other dated July 1, 1868, are liens for the full amounts specified in them, and prior in right to the complainants' mortgage, but that the lien of the mortgage given by the receiver appointed in the suit of Sutherland against the company, in pursuance of the direction of the court in that case, is also a prior lien to the extent of the certificates issued by the receiver; namely, to the extent of $500,000 and interest. This portion

of the decree, it is now insisted, was erroneous. But if the receiver's certificates, issued by order of the court which had the property in charge, are liens at all, what have the appellants, who stand in the place of the company, to do with the order of priority of liens? What difference does it make to them whether the certificates be paid before any other liens are discharged, or after all the debts secured by any mortgage shall have been satisfied? The assignees can get nothing until all the liens on the assigned property have been removed. If the Circuit Court has made a mistake in determining in what order the incumbrances are entitled to payment, that is a matter for the consideration of the incumbrancers, in which neither the company nor the appellants have any interest. We do not understand the appellants to contend that the entire sum of $500,000, for which the receiver's certificates were issued, is not due, or that the receiver was not authorized to make the issue and secure it by mortgage, as he did. This is admitted in the pleadings, and there is positive proof of it in the record. It would be superfluous to spend much time in considering the power of the court to confer the authority upon its receiver that it attempted to confer. As a court of equity, having the mortgaged property in charge, it was its plain duty to preserve it, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court had displaced. Under the provisions of the acts of Congress granting the lands covered by the mortgages, the lands reverted to the United States, unless the ship canal should be finished within a fixed period, and that period was passing away when the order was granted to the receiver to raise money for completing the canal by the issue of certificates secured by his mortgage. The canal was unfinished, and there were in the receiver's hands no funds to finish it. Hence there was a necessity for making the order which the court made, — a necessity attending the administration of the trust the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors. Whether the action of the court could make the receiver's mortgage superior in right to the mortgages which existed when it was made, it is needless to inquire. None of the creditors secured by those other mortgages objected to the order when it was

made, though they were all then in court. None of them object to its lien or its priority now. And we think the appellants, either as representatives of their assignors, or of general creditors, cannot be heard to object. Beyond doubt, they would not be entitled to a return of the property discharged from liability for the receiver's certificates remaining unpaid, even if all the other mortgages were satisfied. As against them the certificates are certainly charges upon the property, and they have, therefore, no right to complain of the decree, which gives the certificates priority to other liens.

That all the bonds secured by the first two mortgages are outstanding and due, is, we think, an established fact. We have observed that the mortgage upon which the present suit has been brought was made subject expressly to those two prior mortgages. In it the mortgagors recited that the company did, simultaneously with those mortgages, "execute, issue, negotiate, and sell" all the bonds covered thereby, and declared that they were an outstanding and subsisting lien. How can these appellants, who stand in the shoes of the mortgagors, be heard to deny these recitals? Yet, if they can, we find no evidence that all those bonds are not now a subsisting debt of the company to the full extent of the sums named in them. There is some proof that, when the company became bankrupt (Aug. 28, 1872), some of the bonds were held as collaterals for loans made to the company smaller in amount than the bonds pledged. But the bonds were subsequently sold by the pledgees, and the present holders hold them by absolute right. The position that the pledgees could not sell the pledge after the adjudication in bankruptcy, is quite untenable. It is sustained by nothing in the Bankrupt Act. The bonds were negotiable instruments. They passed by delivery, and even were there no expressed stipulation in the contracts of pledge, that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the Bankrupt Act has taken away no right from a pledgee secured to him by his contract.

In regard to the bonds covered by the McCarter mortgage, which is the one now in suit, we find no error in the decree of which the appellants can complain. Most of those bonds,

though at first issued as collaterals for loans made to the mortgagors, have been sold, and they are now owned by the purchasers. There are some, it is true, that are still held in pledge; but the pledgees have a clear right to use them, either by sale or by collection, until the full amount of the debts due from the mortgagors is satisfied. We cannot close our eyes to the patent fact that the entire property mortgaged is insufficient to pay the debts with which it is incumbered. The holders of the bonds covered by the Union Trust Company will obtain nothing, and none of the bondholders under the McCarter mortgage will obtain full payment. At least, such is the strong probability. If, therefore, the holders of the McCarter bonds, who hold them as collaterals, are allowed to hold them only for the sums for which they have been pledged, the bonds may, and probably will, prove an insufficient security for the debts actually due from the obligors to the holders. They will prove insufficient, unless the mortgaged property shall bring at the sale enough to pay in full all the bonds held by purchasers, and also all the debts for which the pledged bonds are held. If the sale produces less, there must be a ratable abatement. On the other hand, if the pledgees are allowed to prove the bonds held by them for their full face, these appellants are not injured. If, at the sale, the mortgaged property shall bring more than sufficient to pay the debts for which the bonds are held in hypothecation, the proceeds of the sale will be under the control of the Circuit Court, and it will take care that a proper distribution is made. And if this were not so, the pledgees would hold any excess they might receive in trust for other incumbrancers, or for the appellants. The only persons, if any, who can possibly be injuriously affected by the decree which was made, are the absolute owners of the McCarter bonds, and they acquiesce in it. It is not for those who are not injured to complain.

Of the only other assignment of error which requires notice, it is sufficient to say, that, in view of the circumstances of the case, a sale in bulk is the only possible mode of sale which will enable purchasers to buy with confidence. And a sale by parcels, though ordinarily the proper mode, cannot be made, with any hope of justice to the creditors. *Decree affirmed.*

CORCORAN v. CHESAPEAKE AND OHIO CANAL COMPANY.

1. The Court of Appeals of Maryland, in a suit whereto the parties to this bill were parties, rendered a decision adverse to the right of the holder of coupons attached to the preferred bonds issued by the Chesapeake and Ohio Canal Company, under an act of that State of March 10, 1845, entitled "An Act to provide for the completion of the Chesapeake and Ohio Canal to Cumberland, and for other purposes," to receive, out of the net revenues and tolls of the company, interest on such coupons from the time they respectively mature. In conformity with that decision, the Circuit Court of Baltimore City subsequently entered in the same suit a decree distributing those revenues and tolls, and ordering payment of the coupons from time to time as the same should accrue. *Held*, that the parties to this suit are bound by that decree.
2. The fact that one of the parties then appeared as a trustee for the bondholders does not render the decree less conclusive in a suit where his individual rights in the same subject-matter are involved. If he, at that time, owned any such bonds or coupons, he is bound, because he was representing himself. If he bought them since, he is bound as privy to the person who was represented.
3. In chancery suits, adverse rights as between co-defendants may be determined; and a party who had a hearing and an opportunity to assert his rights will be bound by the decree, so far as it affects them.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Mr. J. D. McPherson, *Mr. Conway Robinson*, and *Mr. Joseph Bryan*, for the appellant.

Mr. John P. Poe and *Mr. Bernard Carter*, for the appellee

MR. JUSTICE MILLER delivered the opinion of the court.

The Chesapeake and Ohio Canal Company, from the date of its organization in 1824–25, issued several series of bonds, secured by as many mortgages on its property. The largest of these mortgages was the earliest, and was given to the State of Maryland for several millions of dollars; another was made to the State of Virginia; both of which States contributed largely, by the use of their credit, to the construction of this important work. In the last stages of the struggle to extend the canal to Cumberland, where it reached the coal-beds, which alone have made it of any value, the company issued another series of bonds to the amount of $1,700,000, for the payment of which it

pledged, by way of mortgage, the revenues and tolls of the canal, after deducting the necessary costs of running the canal and its repairs, and perhaps some other defined outlays.

In this mortgage, Corcoran, the complainant and appellant in the present suit, was one of several trustees for the benefit of the bondholders. He also became, and according to the statements of the present bill is now, a larger holder of these bonds, or of the coupons for interest on them.

The purpose of this bill, which was filed by him on behalf of himself and all others in like condition as holders of this class of bonds, is to enforce the payment of the coupons of interest due and unpaid for many years past.

The defendants to the bill are the Chesapeake and Ohio Canal Company, the State of Maryland, and the remaining trustees of the mortgage bonds on which the suit is founded. They have all answered, except the State of Maryland.

The answer of the trustees is unimportant. The canal company admit the indebtedness and the failure to pay, but deny that, under the reservations of the mortgage of the tolls and revenues in plaintiff's mortgage, there is now or has been in their hands any part of the said revenues which they could lawfully appropriate to the payment of said coupons, except so far as they have already done so. After several amendments of the pleadings and stipulations as to facts, the issue was finally narrowed to two questions; namely, the jurisdiction of the Supreme Court of the District, and the right of the holders of the interest coupons to exact out of the net revenues of the company payment of interest on those coupons from the respective dates when they fell due.

The first of these questions is raised by the proposition of the defendants, the canal company, that the State of Maryland is a necessary party to this suit; and, as she has not voluntarily appeared, and cannot be made amenable to any process to compel an appearance, the bill must be dismissed on that ground.

In the view which this court takes of the other question, and as the court has jurisdiction as to the canal company, it is unnecessary to consider or decide this one.

In reference to the question of interest upon the interest coupons, the canal company, in its answer to complainant's bill,

alleges that, in a suit brought by the State of Virginia in the Circuit Court of Baltimore City, to which suit the present complainant and his co-trustees, the State of Maryland, the canal company and others, representing all the various classes of bondholders, were parties, "the issue raised in this case, that the coupons upon said preferred bonds are entitled to bear interest from their maturity, which is to be allowed payment out of the revenues of this respondent in preference to the claims of the State of Maryland, was distinctly presented, was argued, amongst others, by the solicitors of complainant in this case, and was decided by the court in opposition to the claims of said complainant as then asserted and as reiterated in the bill in this case." The record of that suit, including the opinion of the Court of Appeals and the brief of the counsel of the present appellant, are made exhibits.

The bill of the State of Virginia distinctly claims interest upon the coupons which she held, standing in the same relation as those of the appellant here. The right to that interest as a preference to the debt of the State of Maryland is denied by the answers of the canal company and of the State of Maryland. Corcoran and his co-trustees submit all those matters to the decision of the court. It was, therefore, properly in issue. Indeed, the whole subject of priority of lien as to the revenues and tolls of the canal was before the court, and was the very matter to be decided, and necessarily included the question whether the State of Maryland in the statute by which she waived her prior lien, so far as the revenues of the company were concerned, in favor of the class of bonds and coupons held by the State of Virginia, and those represented by Corcoran, as trustee, included interest upon interest, or only principal and current interest.

The opinion of the Court of Appeals of Maryland, found in the record as an exhibit, and reported in 32 Md. 501, while conceding the general rule, that where the annual or semiannual interest on a bond is represented by a distinct coupon, capable of separation and removal from the main instrument, it bears interest from its maturity, if unpaid; holds that, under the special statute of Maryland authorizing the pledge by the canal company of its revenues for the payment of these preferred

bonds and interest, and waiving her own existing priority of claim on those revenues, simple interest only was meant, and that as to the lien on those revenues and tolls, the interest on the coupons was not included in the lien.

The opinion, undoubtedly, decides the very point in controversy here.

It is said, however, that this is only an opinion, and that unless a judgment or decree is produced there can be no estoppel; and the principle asserted is undoubtedly correct. But, in a stipulation signed by the parties to the present suit, it is agreed "that a decree has been passed by the Circuit Court of Baltimore City making distribution of the net revenues of said canal company, and ordering their payment from time to time as the same accrue, in conformity with the said opinion."

The opinion of the court, then, by virtue of that decree, has become, by the well-settled principles of jurisprudence, the law of the case as to the parties who are bound by that decree.

In avoidance of the application of this doctrine to the present case several objections are urged, some of which are answered sufficiently by the foregoing statement of the record of that suit. We will notice one or two others.

It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be

assailed collaterally on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation.

It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree.

But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee*, v. *Stewart et al.*, 93 U. S. 155, and the authorities there collected.

It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction, which had before it the parties to the present suit; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel; and that it therefore falls within the statutory rule of law which makes such a decision final and conclusive between the parties, and that none of the exceptions to that rule exists in this case.

Decree affirmed.

MR. JUSTICE CLIFFORD dissented.

TATE v. NORTON.

1. In Arkansas, the real as well as the personal estate of the intestate is assets in the hands of an administrator; but neither species of property can be sold without an order of the Probate Court.
2. A claim admitted by the administrator, and allowed and classified by the Probate Court, has the dignity and effect of a judgment.
3. There can be no *devastavit* which will sustain an action against an administrator until he has violated an order of the Probate Court to pay creditors; and his accounts settled by that court cannot be collaterally attacked, but are conclusive, until, by a direct proceeding in equity instituted for that purpose, they are impeached for fraud or mistake.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. W. M. Rose* and *Mr. A. H. Garland* for the appellants, and by *Mr. Albert Pike* and *Mr. Robert W. Johnson* for the appellees.

MR. JUSTICE SWAYNE delivered the opinion of the court.

A brief statement of the facts of this case is necessary to render intelligible the conclusions at which we have arrived. Joseph W. Clay, of the State and county of Arkansas, died intestate in May, 1853. He left a widow, Sarah G. Clay, since deceased, and three minor children, — Joseph W. Clay, also since deceased; Mary S. Clay, since married to Thomas G. Tate; and Caroline Clay, since married to Raynor W. Whitfield. The four parties last named are the appellants.

Thomas Fletcher, the brother of the widow, was appointed by the Probate Court of the proper county administrator of the estate, and qualified as such in July, 1853. Immediately after qualifying he took possession of all the property which belonged to the intestate at the time of his death. It consisted of lands, stock, farming utensils, slaves, and a small amount of money. The value of the lands at that time does not appear. The appraisers estimated the other property at $129,445.54. The slaves were an important item. They were inventoried at $113,400, leaving the balance of other assets $16,045.54. The indebtedness of the estate represented by the claims pre-

sented and allowed by the administrator amounted to $103,436.62. According to the law of Arkansas, the widow was entitled to the possession and use for life of one-third of the lands and of one-third of the slaves, irrespective of the claims of creditors. She was also invested with the absolute ownership of one-third of the personal property.

The condition of the estate as regards the means of meeting its liabilities is thus clearly presented. It requires no argument to show that forced sales by the administrator to pay the debts would have involved disaster, if not ruin, to the family of the deceased. Such is the teaching of all experience. The intestate had been largely engaged in raising cotton. The administrator put himself, as it were, in the place of the deceased. Every thing was carried on and conducted as before his death. Payments were made to the widow from time to time, the children were supported and educated, the taxes were paid, crops were raised, the cotton was sold, and the debts were discharged as fast as the circumstances permitted.

In 1855, the legislature passed a law whereby the probate courts were empowered to authorize administrators to do as the administrator in this case did, provided that the time limited for the settlement of estates, which was three years, should not be extended. The administrator here claims that he received such authority pursuant to this act. This fact does not appear. But it does appear that he made five full settlements with the Probate Court, — the first one in 1855 and the last in 1870. The accounts are in the record. They exhibit all his receipts and disbursements, and fully the manner in which he was discharging the duties of the trust. It does not appear that exception was taken by or in behalf of those concerned, nor that the Probate Court interposed any check or objection. The administrator made no charge for compensation, and was allowed none. By the year 1858 he had paid nearly all the debts. Before the late civil war began he had paid them all but the debt upon which this suit is founded.

The commencement of the war was the beginning of the troubles of the trust. The State was a battle-field. Troops on both sides were there. The slaves were sent to Texas for safety. The mules and other live-stock were swept away by

the advancing and receding tides of the conflict. The lands hardly paid the expenses of cultivating them. Finally the slaves as property were stricken out of existence. This involved a loss to the estate, according to the original inventory, of more than $113,000 of the assets. The administrator became wholly unable to pay this debt. The answer avers, that, but for the war, he could, by the year 1863, have extinguished this demand also, and have then handed over to the heirs a large and unincumbered estate for distribution among them. The record shows that this was not an over-sanguine calculation. The calamity was unforeseen, and one for which the administrator was not responsible. The claim sought to be collected by this proceeding was an account due from the intestate to Sweeney, Greene, & Co. They became insolvent, and assigned it to Hewitt, Norton, & Co. They also became insolvent, and assigned it to the creditors for whose benefit this suit was instituted. The object of the bill is to subject the lands of the intestate to the payment of the debt. It is alleged that all the other assets have been exhausted.

It appears in this connection, that, after the claim was assigned to Hewitt & Co., they became the factors of the administrator for the sale of the cotton which he should raise, and furnished him with money and supplies to carry on the business in which he was engaged for the benefit of the estate. It was agreed that the accounts of the parties should be settled annually, and that the balances found due upon such settlements to the administrator should be applied as credits upon the assigned indebtedness. This was done, until the dealings of the parties were put an end to by the war. For several years thereafter the administrator rented out the lands. Whether leased out or cultivated, they yielded but little. There being no prospect of the voluntary payment of the original debt, the complainants filed their bill, as before stated, to enforce its liquidation.

The appellants filed an answer and a cross-bill. They set up, amongst other things, that the accounts of the dealings between the complainants and the administrator contained overcharges in behalf of the former; that the proper credits had not been given on the original debt; that the conduct of

the administrator in the management of the estate was unwarranted and illegal; that he was guilty of a *devastavit;* and that the entire proceeds of the cotton transmitted by the administrator to the complainants should have been applied by the latter in satisfaction of the original debt of the estate. The accounts and the original demand were referred to a master. He revised the accounts, allowed further credits, and ascertained the amount still due. Both parties excepted. The exceptions were overruled. The court adopted the finding of the master as to the amount due upon the demand in question, decreed that it should be paid within the time specified, and that in the event of default the lands described in the bill should be sold as directed, and the proceeds applied as prayed by the complainants.

The appellants thereupon removed the case to this court for review.

Our further remarks will respond to the several objections without naming them specifically, taken here to the decree below.

The power of courts of equity in this class of cases is ample. Their flexible jurisdiction is always applied as the substantial interests of right and justice may require. *Hook* v. *Payne*, 7 Wall. 425; *Yates* v. *Hambly*, 3 Atk. 363; S. P. 2 id. 263; *Thompson* v. *Brown*, 4 Johns. (N. Y.) Ch. 631.

The conduct of the administrator in the present case, though without the sanction of strict law, did not involve a violation of duty for which a court of equity will hold him responsible, nor the commission of a *devastavit.*

In *Thompson* v. *Brown*, *supra*, the intestate had been a member of a trading firm. The administrator permitted his capital to remain in the concern. He also put in other capital belonging to the estate. The survivors failed, and became insolvent. It was sought to make the administrator liable for both the capital which he left in and that which he put in. In an able and learned examination of the subject by Chancellor Kent, he was held bound for the latter, but not for the former. In his opinion, the Chancellor remarked: "It is said that a court of equity will sometimes appoint a person to carry on a trade for an infant partner. Montague on Partnership, 187, and *Sayer* v. *Bennet*,

there cited. And Lord Mansfield, in the case of *Barker* v. *Parker*, 1 T. R. 295, observed, that he remembered many instances of trade being carried on under the direction of a court of equity." See also *Wedderburne* v. *Wedderburne*, 22 Beav. 84, and *Ryves* v. *Coleman*, 8 Atk. 439. In *Thompson* v. *Brown*, the Chancellor quoted with approbation the language of Lord Hardwicke, in *Knight* v. *The Earl of Plymouth*, 8 Atk. 480, Dickens, 120, as follows: "If there was no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. For a trust is necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety. It is an act of great kindness in any one to accept of it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee would be a manifest hardship, and would be deterring every one from accepting so necessary an office." The same rule was applied by this court in *Markey et al.* v. *Langley et al.*, 92 U. S. 142.

A clearer case for the application of this principle can hardly occur than is presented by the one before us. Throughout the record there is not the slightest imputation, nor apparent ground for any imputation, against the administrator. Even a want of care, diligence, or good judgment is not alleged. His management was eminently successful, until the war occurred. That could neither be foreseen nor averted. It fell with crushing weight upon him. His plan for the redemption of the estate was at once broken up. The means of prosecuting it further were finally lost. In the wreck, nothing was left but the lands, and they without the means of turning them to any account. To hold him responsible for these consequences would be alike contrary to the dictates of reason and justice, and to the settled law of equity. Remonstrance or objection from any quarter, until after the institution of this suit, is nowhere disclosed. In the light of this record, nothing that he did can be lawfully challenged.

According to the laws of Arkansas, there can be no *devastavit* which will sustain an action until an order to pay creditors has been made by the Probate Court, and violated by the administrator. *Oatlaw* v. *Yell*, 5 Ark. 473; *Gordon* v. *The State*,

11 id. 12; *Baker* v. *The State*, 21 id. 405; *Brinkley* v. *Willis*, 22 id. 6. Here no such order is shown. *De non apparentibus et de non existentibus eadem est ratio.* In that State, a claim allowed by the administrator, and allowed and classified by the Probate Court, has the dignity and effect of a judgment. Gould's Dig., c. 4, sect. 115; *Cossit* v. *Biscoe*, 12 Ark. 95; *McMorrin* v. *Overholt*, 14 id. 244. Such was the *status* of the claim here in question.

No discrimination is made by the law of that State between real and personal property as assets. Both are in the hands of the administrator, under his control, and liable to be subjected to the payment of debts. Neither can be sold, unless the will of the testator or an order of the Probate Court so direct. Dig. Stat. of Ark., 1848, sect. 62, c. 4; id., p. 122, sect. 96, c. 4.

The accounts of an administrator settled by the Probate Court cannot be collaterally attacked or questioned. They are conclusive, until impeached for fraud or mistake in a direct proceeding in equity, instituted for that purpose. Dig., sect. 111, c. 4; *Clarke* v. *Shelton*, 16 Ark. 480; *Dooley* v. *Dooley*, 14 id. 124.

Henry Paige acquired the entire interest in the estate of Joseph W. Clay, Jr., deceased, in his lifetime, by proceedings in bankruptcy. Paige made himself a party to the suit by obtaining leave to file an answer. The answer does not appear in the record; but that does not render the entry of his appearance the less effectual.

The debt was sufficiently proved as against the heirs, as well as against the administrator. The action of the Probate Court gave it the effect of a judgment as to both. The amount due upon it was found by the master. The correctness of that finding was not questioned here by the counsel for the appellants.

The exhaustion of all the assets except the lands is clearly shown by the record. The accounts of the administrator, as settled by the Probate Court, cover this ground. In the state of the record they are conclusive. There is also proof of the original amount of the debts and assets, of the amount of the former which had been paid, and of the loss of assets by the manumission of the slaves. In this view, also, it is clear

there could have been no personal assets in the hands of the administrator.

The validity of the administrator's dealings with the complainants has been already sufficiently considered.

The administrator was a trustee for the creditors, as well as for the heirs and distributees. *Payne* v. *Hook*, *supra*; *Baker* v. *Grimes*, 21 Ark. 405; *Brinkley* v. *Willis*, 22 id. 6. The administration of the estate was in progress. There had been no order by the Probate Court that the debts should be paid and a final settlement made. The administrator had done nothing in hostility to the claim. On the contrary, besides allowing it, he had made payments upon it from time to time. The Statute of Limitations can have no application.

The assignment by Sweeney, Greene, & Co. to the complainants is admitted by the answers of Tate and wife, and by that of the administrator. The evidence on the subject was not objected to in the court below, and, therefore, cannot be objected to here. The assignment could have been well made by parol. *Ford* v. *Stewart*, 19 Johns. (N. Y.) 344. The point was not made before the master, when he found the amount due, nor, so far as appears otherwise, in the court below. The report was excepted to by the appellants, but not upon any ground affecting this subject.

The assignment was made in New Orleans, and appears to have been according to the law of Louisiana. Morgan's Code, sect. 2238; *Griffin* v. *Cowan*, 15 La. Ann. 488; *Scott* v. *McDougall*, 14 id. 310; *Dennison* v. *Duplissis*, 12 La. 9.

It rested in the discretion of the court to order the sale of the whole or of a part of the lands. It is not shown that the sale of less than the whole will yield a sum sufficient to meet the requirements of the decree. Error is never to be presumed: it must be made clearly to appear. The execution of the decree will be under the control of the court below; and care will doubtless be taken that no wrong in this respect is done to the appellants. *Decree affirmed.*

COLLINS v. GILBERT.

1. A negotiable instrument, payable to bearer, or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date in the usual course of business, without notice of any thing to impeach his title.
2. The title of a *bona fide* holder for value of an accepted draft, indorsed in blank, is not affected by the fact that the party from whom he received it before its maturity had possession of it for certain purposes, and misappropriated it.

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

This suit was brought by Gilbert & Gay against Thomas Collins upon his acceptance of a certain draft for $8,000, drawn by P. F. Collins & Co., to their own order, and by them indorsed in blank.

The firm of P. F. Collins & Co. consisted of P. F. Collins and John M. Moorhead, who were, as sub-contractors, engaged in grading seven miles of the Connecticut Western Railroad, then in process of construction. The contractor with the railroad company was one Barnes, who was to pay them monthly for work done, less fifteen per cent, retained to secure the proper completion of their contract with him; but they were unable to proceed with the work unless he advanced the retained percentage. He agreed to do so, if they would give him as security for their execution of the contract, to be held by him for that purpose, an acceptance of Thomas Collins to the amount of $8,000.

The draft accepted by him was accordingly given to Barnes, for whom it was discounted by the plaintiffs. The jury found for the plaintiffs; and judgment having been rendered upon the verdict, the case was brought here.

The errors assigned are grounded upon the exclusion by the court below of certain evidence offered by Collins, a statement of which is given in the opinion of the court.

Argued by *Mr. Richard T. Merrick* for the plaintiff in error, and by *Mr. Hill Burgwin* for the defendants in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Transferees of a negotiable instrument, such as a bill of exchange or promissory note payable subsequent to its date, hold the instrument clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument.

Instruments of the kind are commercial paper in the strictest sense, and must ever be regarded as favored instruments as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferable by mere delivery. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 365; *Wheeler* v. *Guild*, 20 Pick. (Mass.) 551; *Noxon* v. *De Wolf*, 10 Gray (Mass.), 346; *Mager* v. *Badger*, 34 N. Y. 249.

Possession of such an instrument payable to bearer, or indorsed in blank, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption. Story on Bills (4th ed.), sect. 416; Byles on Bills (10th ed.), 119; Chitty on Bills (12th ed.), 257; *Mills* v. *Barber*, 1 Mee. & W. 425; *Murray* v. *Lardner*, 2 Wall. 110; *Bank of Pittsburgh* v. *Neal et al.*, 22 How. 96.

Apply that rule in a suit in the name of the transferee against the maker, and it is clear that he has nothing to do in the opening of his case except to prove the signatures to the instrument, and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date, in the usual course of business, without notice of any thing to impeach his title. *Bank* v. *Leighton*, Law Rep. 2 Exch. 61; *Pettee* v. *Prout*, 8 Gray (Mass.), 503; *Way* v. *Richardson*, 3 id. 413.

Clothed as the instrument is with those presumptions, the plaintiff is not bound to introduce any evidence to show that he gave value for the same until the other party has clearly proved that the consideration of the instrument was illegal, or that it

was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Uther* v. *Rich*, 10 Ad. & E. 784; *Bailey* v. *Bidwell*, 13 Mee. & W. 73; *Arbouin* v. *Anderson*, 1 Ad. & E. N. S. 504; *Bank* v. *Fagan*, 7 Moore, P. C. 76; *Fitch* v. *Jones*, 5 El. & Bl. 238; *Smith* v. *Braine*, 16 Ad. & E. N. S. 251; *Hall* v. *Featherstone*, 8 Hurls. & Nor. 286.

Sufficient appears to show that the drawers of the draft described in the declaration were sub-contractors to grade seven miles of a railroad referred to in the affidavit of defence, and that they were to be paid monthly for work done, subject to a certain deduction to be retained as a security for the completion of their contract. Moneys received from the monthly payments being insufficient for the purpose, they were unable to complete their undertaking without an advance from the principal contractor. What they wanted was an advance of $8,000; and it appears that the contractor was willing to make it, if they would give him the acceptance of the defendant in the same amount, as a security that they would perform their contract. Pursuant to that arrangement, they drew their draft upon the defendant in that amount, payable to the order of their senior partner; and the record shows that the draft was accepted by the defendant, and was duly indorsed by the payee.

Beyond doubt, the draft was duly executed and delivered to the contractor as security for the performance of the contract of the drawers of the instrument. By its terms it was payable in ninety days from date; and it must be assumed, in the absence of proof to the contrary, that the plaintiffs became the holders of the same before maturity.

Payment being refused, the plaintiffs instituted the present suit to recover the amount. Process was served, and the defendant appeared and pleaded that he never accepted the draft, and that he never promised in manner and form as alleged in the declaration. Subsequently the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Six offers of proof were made by the defendant in the course of the trial, all of which were excluded by the court, subject to

the exception of the defendant. Four of the rulings of the court in that regard are now assigned for error, and they present the only matters of controversy exhibited in the record. Rulings of the kind, not assigned for error, may be dismissed without remark; nor would the other two exceptions have required much examination, even if they had been assigned for error, as they involve substantially the same questions as those presented by the other rulings of the court.

1. Testimony having been introduced by the defendant that one of the plaintiffs was informed, before the draft came into their hands, that the contractor had agreed to advance money to enable the sub-contractors to pay their employés, they, the sub-contractors, giving the defendant an acceptance as security in lieu of retained percentage, the defendant proposed to ask the witness what was the arrangement between the sub-contractors and the contractor; by virtue of which the defendant's acceptance was obtained; to which the plaintiffs objected, and the court excluded the question.

2. Evidence having been given by the same witness that there was an arrangement between the sub-contractors and the contractor, to the effect that the latter would advance money to the former to pay their men, upon their giving to the contractor the defendant's acceptance, to be retained by him in lieu of the stipulated percentage, the defendant proposed to show by the same witness that the work was finished by the defendant, and that by the terms of the contract all of the percentage retained became due and payable when the contract was completed; which offer of proof was objected to by the plaintiffs, and was ruled out by the court.

3. Complete execution of the draft is not denied; but the theory of the defendant is, that the contractor took the same of the sub-contractors in lieu of retained percentage; and he proposed to show that the sub-contractors subsequently abandoned their contract, and that the defendant, at the suggestion of the contractor, finished the same, he agreeing that if the defendant would complete the work, he, the contractor, would return the acceptance; and that the defendant never got either the percentage or the acceptance: to which the plaintiffs objected, and the court excluded the testimony.

4. Finally, the defendant proposed to show that the contractor, when the acceptance was delivered to him, was indebted to the sub-contractors for retained percentage in excess of the amount of the acceptance; which was also objected to by the plaintiffs, and was excluded by the court.

Properly analyzed and construed, it is quite obvious that these several offers of proof present but a single question, and that they serve to illustrate very fully the different theories of law maintained by the respective parties in respect to such commercial instruments. Throughout the trial the plaintiffs contended that they were the *bona fide* holders for value of the acceptance, having received the same before maturity in the usual course of business, and that they held a good title to the instrument, unless the defendant could show that they had notice of such facts as were sufficient to impeach the title between the antecedent parties, or that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to their possession. *Swift* v. *Tyson*, 16 Pet. 15.

Due delivery of the executed draft to the contractor indorsed in blank is admitted; but the theory of the defendant is that the contractor received it merely as security that the sub-contractors would perform their contract, and that the contractor caused it to be discounted without authority. Neither illegality of consideration nor fraud in the inception of the instrument is charged or pretended; nor is it alleged that the acceptance had been lost or stolen before the plaintiffs received it for discount. Instead of that, the theory of the defendant assumes that the contractor became the lawful holder of the acceptance indorsed in blank for the specified purpose, which is an implied admission that the acceptance was one of a class of commercial instruments which may be transferred by delivery.

Suppose that is so, still it is insisted by the defendant that evidence is admissible in such a case to show that the first holder under such circumstances appropriated the acceptance to a use other than that for which it was delivered to him, and that proof of such a misappropriation is sufficient to impeach the title of a subsequent holder for value, even though it came into his possession before maturity in the usual course of business.

Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question, whether the party who took it had notice or not, is, in general, a question of construction, and must be determined by the court as matter of law. *Andrews* v. *Pond*, 13 Pet. 65; *Fowler* v. *Brantly*, 14 id. 318; *Brown* v. *Davis*, 3 T. R. 86.

But it is a very different matter when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of that character can meet the exigencies of such a defence, if it be true that a party who acquires commercial paper for value in the usual course of business may, if it was acquired before maturity and without notice of any defect in the title, hold it free of all equities between the antecedent parties to the instrument.

Indorsees of negotiable bills of exchange and promissory notes enjoyed the benefit of that rule for ages before any attempt was made to annex any qualification to it, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Hinton's Case*, 2 Show. 247; *Anonymous*, 1 Salk. 126; *Miller* v. *Race*, 1 Burr. 462; *Grant* v. *Vaughan*, 3 id. 1516; *Peacock* v. *Rhodes*, 2 Doug. 633; *Lawson* v. *Weston*, 4 Esp. 56.

Attempt was subsequently made to qualify that right of a *bona fide* holder, and to establish the rule, that if the indorser of the instrument had no valid title to the same, and that such facts and circumstances were known to the indorsee at the time of the transfer as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. *Gill* v. *Cubitt*, 3 B. & C. 466.

Though the modified rule was never satisfactory, yet it must be admitted that it was followed for a time in many jurisdic-

tions. But it is unnecessary to discuss that topic, as the case referred to has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority there for more than forty years. *Goodman* v. *Harvey*, 4 Ad. & E. 870.

Abundant authority for that proposition is found in the cases already cited, and Mr. Chitty says that the old rule of law, that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess to a person taking the same *bona fide* for value, is again re-established in its fullest extent. Chitty on Bills (12th ed.), 257.

Speaking upon that subject, the Supreme Court of Massachusetts said that it was once held that the holder of a bill of exchange or promissory note fraudulently put in circulation must show that he had used due and reasonable caution in taking it; but the court proceeds to say that it has since been definitively adjudged that if he took the instrument in good faith he is entitled to recover on it, and that even gross negligence is not tantamount to fraud, though it may be given in evidence as tending to prove that charge, that the burden of proving good faith is all the burden which the law imposes on such a holder. *Worcester Bank* v. *Dorchester Bank*, 10 Cush. (Mass.) 491.

Conclusive support to that conclusion is found in the authorities which the court cite for that purpose, among which are the following: *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Arbouin* v. *Anderson*, 1 Ad. & E. N. S. 504. We must hold, said Lord Denman, in the case last cited, that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession; that, to meet the inference so raised, fraud, felony, or some such matter, must be proved. *Smith* v. *Sac County*, 11 Wall. 146.

Instruments of the kind are intended for circulation, and Shaw, Ch. J., says that the law is so framed to give confidence and security to those who receive them, for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery; and he adds that, in general, a party taking such an instrument

under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen and afterwards be negotiated for a valuable consideration, in the usual course of business, to one who has no knowledge of those facts, his title is good, and he shall be entitled to receive the amount. *Wheeler* v. *Guild*, 20 Pick. (Mass.) 350.

Title and possession in such a case are, in general, considered one and inseparable, and it will be presumed that a party thus in possession of such an instrument holds it for value until the contrary appears, and the burden of proof is on the party impeaching his title. *Collins* v. *Martin*, 1 B. & P. 648; *Bank* v. *Hoge*, 35 N. Y. 68; *Phelan* v. *Moss*, 67 Penn. St. 63; *Raphael* v. *Bank*, 17 C. B. 171.

In order to defeat the rights of a *bona fide* holder for value of a promissory note, which it is claimed was procured by fraud, it must be shown, either directly or by circumstances, that he had notice of such infirmity.

Proof of such facts and circumstances as would have put a reasonable man upon inquiry in relation thereto are not sufficient to constitute a defence to a suit by the holder. *Lake* v. *Reed*, 29 Iowa, 359; *Gage* v. *Sharp*, 24 id. 15.

Adjudged cases to support those propositions are very numerous, and it is equally well settled that where a negotiable bill or note is given in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the instrument, or at least antecedently to its becoming due; and the rule is, that if the defendant would avail himself of any defence not open to him, unless the bill or note was negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the instrument was overdue. *Ranger* v. *Cary*, 1 Met. (Mass.) 373; *Noxon* v. *De Wolf*, 10 Gray (Mass.), 347.

Actual possession of a negotiable instrument, payable to bearer or indorsed in blank, is plenary evidence of title in the holder "until other evidence is produced to control it;" but if to an action on the same "the defendant pleads that it was illegal in its inception, and that the plaintiff took it without

value, the illegality being proved, the *onus* is cast upon the plaintiff to prove that he gave value." *Smith* v. *Braine*, 16 Ad. & E. N. S. 250; *Bailey* v. *Bidwell*, 13 Mee. & W. 73.

Proof of gross negligence is not sufficient to overcome the *prima facie* presumption of title arising from possession; but if it be alleged and proved that the instrument had its inception in illegality or fraud, a presumption arises from that proof that the plaintiff took it without value, or, in other words, it so far shifts the burden of proof, that, unless the plaintiff gives satisfactory evidence that he gave value for the same, the defence will prevail. *Fitch* v. *Jones*, 5 El. & Bl. 246; *Harvey* v. *Towers*, 6 Hurls. & Gord. 660.

Where there are circumstances, in the nature of fraud or illegality, which can properly be left to the jury, proof of those circumstances by the defendant will cast on the plaintiff the *onus* of showing that he gave value for the bill or note. *Hall* v. *Featherstone*, 8 id. 287; *Mills* v. *Barber*, 1 Mee. & W. 432.

Negotiable instruments are expressed to be for value, and, if payable to bearer or indorsed in blank, they pass by delivery from hand to hand, clothed with that presumption; nor is that presumption overcome, where the suit is in the name of a subsequent holder, by proof that the indorsement was for the accommodation of the maker.

If it appears that the bill or note was obtained by fraud, or that it had been stolen before it came to the possession of the holder, then the presumption may arise that the holder did not pay full consideration for it, because in such a case it is probable that the person obtaining the instrument would pass it away for less than its full value. But where there is only the simple fact that it was an accommodation bill or note, then the inference is that the holder did give value for it, because that was the very object for which the instrument was given. *Percival* v. *Frampton*, 2 Cromp., M. & R. 183; *Seybel* v. *Bank*, 54 N. Y. 291.

Decided cases, almost without number, support that proposition; but if the note or bill is founded in fraud, or was fraudulently obtained and put in circulation, the indorsee must prove that he paid value for it before he can recover the amount. *Tucker* v. *Morrill*, 1 Allen (Mass.), 528; *Maither* v. *Maidstone*,

1 C. B. N. S. 287; *Sistermans* v. *Field*, 9 Gray (Mass.), 387; *Brush* v. *Scribner*, 11 Conn. 390.

Tested by these several considerations, it is clear that there is no error in the record. *Judgment affirmed.*

FORBES v. GRACEY.

1. Although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and, becoming personal property, are, as such, subject to State taxation in like manner as other personal property.
2. The words "mines or mining claims" in the sixth section of the act of the legislature of Nevada of Feb. 28, 1871, imposing a tax upon such ores, and making it "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the miner is the owner of the soil, and therefore has a perfect title to the mine, and those in which he works under a mining claim, the title to the land remaining in the United States. In the first case, the tax is a valid lien on the mine itself; but in the second, only upon his possessory right, under existing laws and regulations, to work and explore the mine.
3. Such a claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the non-payment of them, without infringing the title of the United States.

APPEAL from the Circuit Court of the United States for the District of Nevada.

The case is stated in the opinion of the court.

Submitted on printed arguments by *Mr. Hall McAllister* for the appellant, and by *Mr. W. E. F. Deal* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This was a suit brought by appellant to enjoin the collector of taxes for Story County, Nevada, from collecting a tax imposed by the law of that State upon the property of the Consolidated Virginia Mining Company, the appellant being a stockholder in the company and an alien subject of the Queen of Great Britain. The tax is, by the State statute, imposed upon the proceeds of the mine worked by the corporation, and is resisted on the ground that the title to the land from which

the mineral is taken is in the United States, and is not for that reason liable to State taxation.

The case is prepared and submitted to us on printed arguments in the very last days of the term, and we are urged to decide it on the ground that it involves a question of vast interest to all the mining operations in the Pacific States, and is of vital importance to the State of Nevada, as it affects her largest source of revenue. In view of its importance we should postpone the decision until next term, if the questions presented were either doubtful or difficult of solution. We think a very few words — all we can give to the subject at this late day — will show that it is neither.

It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, title xxxii. chap. 6, sects. 2318–2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property-right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the act of Feb. 28, 1871, imposing this tax: —

"SECTION 1. All ores, tailings, and mineral-bearing material of whatever character shall be assessed for purposes of taxation for State and county purposes in the following manner: From the gross yield, return, or value of all ores, tailings, or mineral-bearing material of whatever character, there shall be deducted the actual cost of extracting said ores as minerals from the mine, the actual cost of saving said tailings, the actual cost of transportation of said ores, mineral-bearing material, or tailings to the place of reduction or sale, and the actual cost of such reduction or sale, and the remainder shall be deemed the net proceeds, and shall be assessed and taxed as provided for in this act: *Provided*, that in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield, return, or value of said ore, mineral-bearing material, or tailings exceed the percentage of gross yield, value, or return of such ore, mineral, or tailings, as hereinafter specified; on all ores, tailings, or mineral-bearing material the gross yield or value of which is $12 per ton or less, the whole amount of deductions shall not exceed ninety per cent of such gross yield, return, or value; on all ores, tailings, or mineral-bearing material, the gross yield, value, or returns of which is over $12 and under $30 per ton, the whole amount of deductions shall not exceed eighty per cent of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is over $30 and less than $100 per ton, the whole amount of deductions shall not exceed sixty per cent of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is $100 per ton or over, the whole amount of deductions shall not exceed fifty per cent of such gross yield, return, or value: *Provided*, that an additional exemption of $15 per ton may be allowed on all ores, tailings, or minerals worked by the Freiburg process.

"SECT. 2. It shall be the duty of the several county assessors within this State to compare and complete quarterly, on or before the second Monday in February, May, August, and November, in each year, a tax list or assessment roll of the proceeds of the mines, alphabetically arranged, in a book furnished them by the board of county commissioners for that purpose, in which book shall be listed or assessed the proceeds of all mines in their respective counties, as provided in this act."

"SECT. 6. Every tax levied under the authority or provision of this act on the proceeds of the mines is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold

or silver, or either or any other valuable metal, is extracted for reduction, which lien shall attach on the first days of January, April, July, and October of each year, for the quarter year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of the mines, are all paid, or the title to said mines or mining claim is absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining claims."

"SECT. 10. The collection of the tax authorized to be levied under this act shall be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected."

What is this manner of enforcement is to be found in sect. 110 of a previous statute, which reads as follows: —

"At any time while the assessment roll of any quarter is in the hands of the assessor for collection, the assessor may seize upon the personal property, or so much thereof as may be sufficient to satisfy the taxes and costs, of any person, firm, corporation, association, or company who shall neglect or refuse to pay such taxes for one week after such demand of the assessor or his deputy, and shall post a notice of such seizure, with a description of the property, and the time and place whereon it will be sold, in three public places in the township or precinct where it is seized, and shall, at the expiration of five days, proceed to sell at public auction, at the time and place mentioned in the notice, to the highest bidder for cash, a sufficient quantity of such property to pay the taxes and costs incurred."

From the first section of the statute we ascertain what it is that is taxed; namely, all the ores, tailings, or mineral-bearing material of whatever character, after deducting the actual cost of extracting said ores as mineral from the mines, and other expenses, such as transporting them to the place of reduction, &c.

From this it is clear that it is the ore after it has been separated from the bed in which it is found, and its proceeds and products, which are taxed, and not the ore or mineral in the earth. Indeed, this latter idea is not advanced by any one, and it would be preposterous.

As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the

man whose labor, capital, and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

The truth of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax or in the sale of the property taxed. It is, however, urged with more show of reason that sect. 6, which makes this tax "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," is an interference with the right of property of the government in the lands in which the mineral remains are extracted.

An examination of the language we have quoted will show that it was carefully prepared to avoid this objection, and we think it does.

The use of the words "mines or mining claims" is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of Congress, as a mining claim. In the first case, the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject.

In the former case, of course, the United States has no interest to be protected, and the State is at liberty to declare and enforce such a lien for her taxes. In the latter, also, such right as the mining laws allow and as Congress concedes to develop and work the mines, is property in the miner, and

property of great value. That it is so, is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purpose of evading this tax, permits its investment in this mine, said to be worth from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared to the value of the mine, obtain the government's title to the entire land, soil, mineral, and all. Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast States. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.

We are of opinion that the decree of the Circuit Court dismissing the bill of appellant on demurrer was right. It is, therefore, *Affirmed.*

MR. JUSTICE FIELD took no part in the decision of this case.

LIPPINCOTT v. MITCHELL.

A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns for ever," vests in her, under the laws of that State, a statutory separate estate; and a mortgage of the lands, executed by her and her husband to secure the payment of his debts, is void.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The case is stated in the opinion of the court.

Mr. J. Hubley Ashton for the appellant.

Mr. Percy Walker for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case is brought here by appeal from the Circuit Court of the United States for the Southern District of Alabama. It depends for its determination upon a branch of the local law of real property. The question involved relates to the separate estates of married women. The facts are undisputed. The premises in question were conveyed to the appellee, Nannie C. Mitchell, by deed duly executed, bearing date on the nineteenth day of March, 1868.

On the 17th of February, 1869, Nannie C. Mitchell and J. C. Mitchell, her husband, mortgaged the premises to the appellants, J. B. Lippincott & Company, to secure the payment of certain liabilities therein described. The instrument contained a power of sale. The mortgagees advertised the property to be sold pursuant to the power. She thereupon filed this bill to enjoin the sale, upon the ground that under the law of Alabama she was incompetent thus to incumber the property; and that the mortgage was, therefore, void.

The Circuit Court decreed a perpetual injunction. The mortgagees thereupon removed the case to this court by appeal.

The Code of Alabama, art. 3, sect. 2371, declares that "all the property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage in any manner, is the separate property of the wife, and is not subject to the payment of the debts of the husband."

Prior to the judgment of the Supreme Court of the State in 1869, in *Molton* v. *Martin*, 43 Ala. 651, it was the settled law in that State that there were two distinct kinds of separate estates, — one designated equitable, and the other statutory. With respect to the former, the rule was that it was wholly independent of the statute. It was as if the statute did not exist. The rights of the husband were excluded, but the powers of the wife might be defined and limited by the instrument conveying it as was deemed proper by those concerned. If no limitation was imposed, they were regulated by the general rules of equity jurisprudence upon the subject. According to those rules, where there was no restriction, she was in effect a *feme sole* as to such property. She could incumber or dispose of it at pleasure. The income belonged to her, and she was not bound to contrib-

ute out of it any thing for the support or benefit of the husband's family. *M. Church* v. *Jacques*, 3 Johns. (N. Y.) Ch. 77; *Gun* v. *Samuels*, 33 Ala. 201; 2 Story's Eq., sects. 1392, 1393.

She stood, with respect to such property, in the same relation to the husband as if it belonged to a stranger. She had, therefore, the same capacity as any other person who might be the owner to mortgage it for his debts. The creation of such conventional estates was sustained, because there was nothing in them contrary to law or public policy. The parties concerned were, therefore, permitted to contract as they pleased.

But where no such separate estate existed with respect to property owned by the wife at the time of the marriage, or acquired subsequently, the statute interposed and created a separate estate in her behalf, with such incidents and attributes as the legislature saw fit to prescribe. Among these were the right of the husband to control the property and receive the income without accounting for it, and the liability of the estate for articles of support and comfort procured for the use of the family suitable to its condition in life, for which the husband would have been liable according to the common law. If he survived her, and she died intestate, he was entitled, as distributee, to one-half of her personalty, and to the use and enjoyment of her real estate for life. If she survived him, the value of her separate estate was deducted from her distributive share of his personalty and her dower. But she could not mortgage the estate for her husband's benefit, and such mortgages were of no validity.

The judgment of the court in *Molton* v. *Martin*, *supra*, and in *Glen* v. *Glen*, 47 Ala. 204, and in *Dennichand* v. *Berry*, 48 id. 591, the two latter following and controlled by the former, abolished the distinction between the two classes of separate estates, and brought all such equitable estates, except where the legal title was vested in a trustee, within the statute.

It followed as a consequence that the wife could no more mortgage an equitable than a statutory separate estate for the husband's benefit, and that all such mortgages were void, by reason of her disability in both cases.

Such was the state of the law when the present case was

decided by the Circuit Court. The conclusion reached was inevitable, whether the separate estate of the wife belonged to one class or the other, the question then being immaterial in the jurisprudence of the State. The result, as to the point under consideration, was necessarily the same in both cases.

The subject again came under the consideration of the Supreme Court of the State in 1875, in *Short* v. *Battle*, 52 Ala. 456. It was ably and elaborately examined. The court unanimously overruled the cases of *Molton* v. *Martin*, *Glen* v. *Glen*, and *Dennichand* v. *Berry*. The pre-existing state of the law was re-asserted and re-established. The statute was construed as it was construed before *Molton* v. *Martin* and the subsequent cases in harmony with that case were determined.

This construction is a rule of property of the State, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the State as if we were sitting there as a local court, and this case were before us as such a tribunal. *Leffingwell* v. *Warren*, 2 Black, 579; *Olcott* v. *Bynum*, 17 Wall. 44.

We are thus brought to the examination of the question whether the estate to which this litigation relates belongs to the equitable or to the statutory class. If to the latter, the decree of the Circuit Court is correct; if to the former, it must be reversed.

No particular words or phrases are necessary to create an equitable separate estate. The court will examine the whole instrument, and look rather to the intent manifested than to the language employed. The creative intent must clearly appear. Doubts are resolved in favor of the husband's marital rights. Bish. Law of Married Women, sect. 824. In *Short* v. *Battle*, *supra*, the Supreme Court of the State laid down this rule: "Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes, and fixes the character of the estate as the separate statutory estate of the wife."

The deed here in question purports on its face to be executed by "Huriosco Austill, trustee for Mrs. Mary A. Marshall," recites that the sale and conveyance were made pursuant to her written request, and then proceeds: —

"Now, know all men by these presents, that I, Huriosco Austill, as trustee, as aforesaid, for and in consideration of the sum of $4,600, lawful money of the United States, to me in hand paid by Nannie C. Mitchell at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said Nannie C. Mitchell, her heirs, executors, and administrators for ever, released and discharged from the same, have granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, convey, and confirm, to the said Nannie C. Mitchell, her heirs and assigns for ever, all and singular that certain lot of land situate, lying, and being in the city of Mobile, and described as follows, to wit:—

. . . . . .

"Together with the tenements, hereditaments, rights, members, privileges, and appurtenances unto the above-mentioned premises belonging or in any way appertaining: to have and to hold the above-granted and described premises with the appurtenances unto the said Nannie C. Mitchell, her heirs and assigns, to the sole and proper use, benefit, and behoof of the said Nannie C. Mitchell, her heirs and assigns for ever."

If it were intended by this deed to give the wife a separate estate, it is remarkable that in the mass of redundant verbiage employed no words clearly apt for that purpose are to be found. It is remarkable, if such an intent existed, that the phrase, "for her separate use," or "for her exclusive use," or "free from the control of her present or any future husband," or some equivalent for one of them, was not inserted. The omission can only be accounted for upon the hypothesis that the idea of a separate estate was not in the mind of either of the parties, and that hence no instruction upon the subject was given to the draftsman of the deed. There is nothing in the record to warrant the belief that the purchase and conveyance were not intended to be such a transaction in the ordinary way, without securing to the grantee any special rights touching the property, or any right other than that of the ownership in fee-simple.

The only part of the deed which gives a shadow of support to the proposition of the appellants is the language of the *habendum*.

The same language is to be found in many precedents in books of forms, where, certainly, there was no purpose to create a separate estate. Thus, in Oliver on Conveyancing, an American work, in the form of a deed by an administrator, p. 290, the *habendum* is, "To have and to hold the same to the said J. C. and W. W., their heirs and assigns, to their sole use and behoof for ever." So, in the form of a deed to a corporation, id. 279, "To have and to hold the same, with the appurtenances thereof, to the said corporation and their assigns, to their sole use and behoof for ever." Instances to the same effect in other like works might be largely multiplied.

Such was also the ancient English form of the *habendum*, except that the term "only" was used instead of "sole."

In Lilly's Practical Conveyancer, published in 1719, in the form of a release in fee, the *habendum* is, "To have and to hold the said," &c., "to the only proper use and behoof of the said C. C., his heirs and assigns for ever." And such is the modern English form. Thus, in the form of a deed of feoffment, in 4 Blythewood, 130, the *habendum* is, "To have and to hold the said close," &c., "to the only proper use of the said [feoffee], his heirs and assigns for ever."

We have examined the cases upon the subject, referred to by the learned counsel for the appellants, and many others, both the English and American. Some of them go to a very extreme length in one direction, and some in the other. Not a few of them are in irreconcilable conflict. To examine and discuss them in detail would unnecessarily prolong this opinion, and could serve no useful purpose. We therefore forbear to remark further in regard to them.

Without the aid of the rule of doubt recognized by all the authorities upon the subject, we have no difficulty in coming to the conclusion that the deed of Austill cannot be held to have vested in the grantee a separate estate, or any other estate than a fee-simple. When she executed the mortgage, she had, therefore, a statutory separate estate. Hence the mortgage was void. *Decree affirmed.*

MR. JUSTICE STRONG dissented.

HOGAN v. KURTZ.

1. The act of Congress, approved June 1, 1870 (16 Stat. 146), abolishing all fictions in ejectment within the District of Columbia, does not abolish that action, nor convert it into a writ of right.
2. Uninterrupted, open, visible, exclusive, and notorious adverse possession by the defendant, under a claim of title for twenty years, is a good defence, unless the other party is within some one of the exceptions contained in the Statute of Limitations; and proof of such possession is admissible under the general issue.
3. The Statute of Limitations, when it begins to run, will not be arrested by any subsequent disability; and a party, claiming the benefit of its exceptions, can only avail himself of the disability which existed when the right of action first accrued.
4. This action of ejectment was brought more than three years after the passage of the act of March 3, 1865, the second section whereof (13 Stat. 532) abrogated all exceptions in favor of parties beyond the District of Columbia, which, under then existing laws, might be replied or relied on in any action or proceeding brought in said District, with a saving as to actions then pending, or which might be brought within three years thereafter. The exception of those laws in favor of such of the grantors of the plaintiff as were foreigners and lived beyond seas was no longer in force.

ERROR to the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Mr. Enoch Totten for the plaintiffs in error.

Mr. J. D. McPherson and *Mr. George F. Appleby* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Fictions in pleading in actions of ejectment in the courts of this District are abolished, and the provision is, that "all actions for the recovery of real estate in the District shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed" of the same. 16 Stat. 146.

Certain described parts of lot numbered 17, in square 877, according to the recorded plat of the city, were, on the 11th of June, 1870, in the possession of the defendant; and it appears that the plaintiffs, claiming to own the premises, sued the defendant on that day to recover the same, alleging that they, on the 12th of October previous, were lawfully possessed of the premises, and that the defendant then and there unlawfully entered the premises and ejected the plaintiffs therefrom, and that she has

ever since and now does unlawfully detain the same, claiming both the property and the right to possess the same.

Service was made; and the defendant appeared and filed two pleas: 1. That she is not guilty in manner and form alleged in the declaration. 2. That the lot of land described is, and was at the time alleged, the property of the defendant, and that being justly entitled to the possession thereof she lawfully entered into the premises.

Issue was duly joined by the plaintiffs; and the parties subsequently went to trial, which resulted in a verdict and final judgment for the defendant. Exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Six errors are assigned by the plaintiffs, as follows: 1. That the action is not barred by the limitation of twenty years, the same having been commenced since the act of Congress abolishing fictions in pleading in actions of ejectment. 2. That the court erred in admitting evidence to establish adverse possession by the defendant, the Statute of Limitations not having been pleaded. 3. That the court erred in admitting in evidence the record of the former ejectment suit, the same having been commenced before fictions in pleading in such suits had been abolished, and because the holding of the testatrix of the defendant was in subordination to the heirs. 4. That the court erred in admitting parol evidence to show that the first husband of the testatrix of the defendant, under whom she claims, was duly naturalized. 5. That the court erred in refusing the prayer of the plaintiffs, that the Statute of Limitations did not run against the four grantors of the plaintiffs who were foreigners, and resident beyond seas. 6. That the court erred in refusing to give the prayer of the plaintiffs, that they must recover the two-fifths of the property which belonged to their two female grantors, who, having married in 1845, could not be affected by the Statute of Limitations, it appearing that the second husband of the testatrix disclaimed all title to the premises during their coverture.

Exceptions not assigned as error will not be examined.

Prior to the passage of the act abolishing fictions in pleading in actions of ejectment, it is conceded that the limitation in such cases was twenty years; but the proposition is submitted

by the plaintiffs that the act referred to converts the action, where it is brought in the name of the real party, into a writ of right, and that it extends the limitation to the same period as that which is by law allowed for remedies in that form of proceeding. Nothing of the kind is found in the language of the act, and no authorities are cited in support of the proposition, or which give it any countenance whatever. Fictions are abolished where the pleading is in ejectment; but the action of ejectment is not abolished, nor is there any provision in the act making any other alteration in the form of the action than that it shall be commenced in the name of the real party in interest, and against the owner or the party in possession. Jackson on Real Actions, 284.

State laws abolishing such fictions sometimes provide what the effect of the new provision shall be, and it is settled law that the State regulation in that regard is a rule of property which the Federal courts must follow. *Miles* v. *Caldwell*, 2 Wall. 43; *Blanchard* v. *Brown*, 3 id. 249.

Alterations of the kind, it is usually held, place the final judgment in ejectment upon the same footing as judgments in other actions; but there is no trace of authority, either in State legislation or in judicial decision, to show that the provision abolishing such fictions in the action of ejectment converts the action into a writ of right, or that the action, when commenced in the name of the real party against the owner or the party in possession, falls under any other rule of limitation than the action of ejectment when commenced in the old form, unless the statute abolishing such fictions contains some provision warranting such a construction. *Barrows* v. *Kimball*, 4 id. 408.

Beyond question, the action is still an action of ejectment, and the plaintiff must still recover on the strength of his own title, and not on the weakness of that of his adversary. *Watts* v. *Lindsey*, 7 Wheat. 161; *Gilmer* v. *Poindexter*, 10 How. 267.

Evidence to prove adverse possession in an action of ejectment is admissible though the Statute of Limitations is not pleaded in defence. *McConnel* v. *Reed*, 4 Scam. 124; Stearns on Real Actions, 241.

Ejectment cannot be maintained, unless it be brought within twenty years next after the right of entry accrued; and it

follows that adverse possession in the defendant for twenty years is evidence of title in the possessor, and constitutes a good defence to the action. 1 Chitty, Pl. (16th Am. ed.) 213; *Hallet* v. *Forest*, 8 Ala. 264; *Hammond* v. *Ridgely*, 5 Harr. & Johns. 151; *Jackson* v. *Brink*, 5 Cow. 480; *Briggs* v. *Prosser*, 14 Wend. 227; *Jackson* v. *Harder*, 4 Johns. 202.

Adverse possession under a claim of right, if uninterrupted, open, visible, and notorious, may be set up in such an action, not only as a defence to the cause of action set forth in the declaration, but to show the nullity of any conveyance executed by any one out of possession. *Bradstreet* v. *Huntington*, 5 Pet. 438; Angell on Lim. (6th ed.) 386; 2 Greenl. Evid. (12th ed.), sect. 430; *Hawk* v. *Genseman*, 6 G. & R. 21.

Two objections were made to the admissibility of the record of the former ejectment suit, as follows: 1. Because the parties were fictitious, the suit having been commenced before fictions in pleading were abolished in such actions. 2. Because the defendant, as the plaintiffs allege, held the premises in subordination to the title of the heirs-at-law.

Sufficient has already been remarked to show that the first objection is without merit, for the reason that the record was not offered or admitted as a bar to the present suit, and also for the reason that it tended to show that the defendant claimed to hold the premises adversely to the heirs; nor is there any legal merit in the second objection, as the question whether the possession of the defendant was or was not adverse to the heirs was plainly a question of fact for the jury, and must be considered as concluded by the verdict.

By the record, it appears that the testatrix of the defendant was twice married; that her first husband immigrated here in the year 1794, married here, purchased the lot in question, and built a house on it as a family residence; that they never had any children, and that he died in 1828, leaving her surviving him; that she married a second husband, whom she survived, and died testate in 1869, devising the property to her sister, the defendant in error.

Throughout her life, subsequent to the decease of her first husband, the testatrix held actual, exclusive, continuous, visible, and notorious possession of the property, and the evidence is

full to the point that the defendant, as her devisee, continued so to hold the same from the death of the testatrix to the present time. Forty-two years elapsed after the death of the first husband of the testatrix before the present suit was commenced, the plaintiffs claiming to be collateral heirs or the representatives of collateral heirs.

Where there are no descendants or kindred of the intestate to take the estate, the law of descents applicable in the case provides that the estate "shall then go to the husband or wife, as the case may be." *Spratt* v. *Spratt*, 1 Pet. 343.

Provision is also made by a subsequent statute, that any foreigner may, by deed or will to be hereafter made, take and hold land within this District in the same manner as if he was a citizen; "and the same lands may be conveyed by him, and be transmitted to and be inherited by his heirs and relations, as if he and they were citizens." *Same* v. *Same*, 1 id. 344.

Beyond doubt, the first husband immigrated here from Ireland; but the record shows that he filed his declaration of intention to become a citizen July 11, 1801, six years or more after he arrived here and settled in this District. Documentary proof that he took out his second papers is wanting; and the plaintiffs contend that he could not have been naturalized when he purchased the lot in question, because three years from the time he filed his declaration of intention had not then elapsed, and they refer to the act of the 29th of January, 1795, in support of the proposition. 1 Stat. 414.

Tested by that act, the proposition would be correct; but the act of the 4th of April, 1802, provides that any alien, who was residing within the limits and under the jurisdiction of the United States before the 29th of January, 1795, may be admitted to become a citizen on due proof made to some one of the courts, previously named, that he has resided two years at least within and under Federal jurisdiction, and one year at least immediately preceding his application within the State or Territory where such court is at the time held. 2 id. 154.

Proceedings of the kind are required to be recorded; but it was proved or conceded that the records of such proceedings in this District were destroyed many years ago; and in view of that fact, and of the long period between the purchase of the

property and the other evidence exhibited in the record, the court left the question whether the party was or was not naturalized to the jury, and they found the issue in favor of the defendant. Seasonable objection was made by the plaintiffs to the admissibility of the parol evidence, and they now contend that the court erred in admitting secondary evidence to prove that that party became a citizen.

Enough appears to show that he possessed every requisite qualification to enable him to become a citizen at any time, and that he constantly exercised rights belonging to citizens; and, in view of the great lapse of time since he acquired the property, the court here is clearly of opinion that the assignment of error must be overruled.

Suppose that is so, still the plaintiffs contend that the court erred in refusing the prayer of the plaintiffs that the Statute of Limitations did not run against the four grantors of the plaintiffs who were foreigners and residents beyond seas.

Persons beyond seas, it is admitted by the defendant, are within the exceptions contained in the Statute of Limitations originally applicable in this District. Grant that, still the defendant contends that the case is controlled by the more recent act of Congress, which provides that all exceptions in favor of parties beyond the District of Columbia, which may, by existing laws, be replied or relied on in any action or proceeding brought in said District, "are hereby repealed and abrogated," with a saving clause for pending actions, and such as should be brought within three years from the passage of the act. 18 Stat. 532.

Passed as that act was five years before the present suit was commenced, it is clear that the plaintiffs are not within the saving clause, and that the prayer for instruction was properly refused.

Two of the grantors were females resident abroad, and the record shows that they were married in 1845; and the plaintiffs contend that the court erred in refusing the prayer of the plaintiffs that they must recover the two-fifths of the property which belonged to their two female grantors, who, having been married at the time mentioned, could not be affected by the Statute of Limitations.

Attempt to take their case out of the operation of the rule applied to the other four grantors is made upon the ground that the second husband of the testatrix disclaimed the title during their coverture, but the better opinion is, that his disclaimer did not in any manner affect the possession and claim of the wife, and such, it would seem, must have been the finding of the jury. Concede that, and it follows that the Statute of Limitations commenced to run seventeen years before the marriage of the two grantors, which brings their case within the established rule, that, when the statute has begun to run, it will continue to run without being impeded by any subsequent disability. Angell on Lim. (6th ed.), sect. 477; *Currier* v. *Gale*, 3 Allen, 328; *Smith* v. *Clark*, 1 Wils. 134; *Demorest* v. *Wynkoop*, 3 Johns. Ch. 138; *Eager* v. *Com.*, 4 Mass. 182.

Disabilities which bring a party within the exceptions of the statute cannot be piled one upon another, but a party claiming the benefit of the exception can only avail himself of the disability existing when the right of action first accrued. *Mercer's Lessee* v. *Selden*, 1 How. 37.

Possession of an adverse character, and decidedly hostile to the claim of the heirs-at-law, was maintained by the testatrix of the defendant for more than forty years, claiming to own the premises in her own right; and the court here is inclined to concur with the court below, that the question whether or not her first husband was ever naturalized is a matter of no consequence, as her possession was not affected by that consideration. No such disability attached to the testatrix; and the evidence is beyond dispute, that she was capable of acquiring an interest in the premises by any of the methods known to the laws of the District.

Abundant proofs are exhibited in the record to show that she had been in the possession of the property from the decease of her first husband to the time of her own death, claiming to own it in her own right, and renting it and using it under a claim that it was her own property. Such a possession so evidenced usually affords a presumption that the occupant claims the property, and where it is adverse, open, visible, and continuous for twenty years, it is sufficient evidence of title to toll the real owner's right of entry, unless he can prove that he was within

some one of the exceptions contained in the Statute of Limitations, even in a jurisdiction where those exceptions are still in force.

Better proof to show that persons claiming title to the premises were notified that her possession was adverse and hostile to their claim can hardly be imagined than what is exhibited in the case before the court. Thirty years before the present suit was commenced, a common-law action of ejectment was instituted for the same premises, in which the father and the grantors of the plaintiffs were described as the lessors of the fictitious plaintiff in the suit, and it appears that the suit was defeated by the testatrix of the defendant, aided by her second husband, then in full life.

Viewed in any light, we are all of the opinion that there is no error in the record. *Judgment affirmed.*

COCHRANE v. DEENER.

1. The powers and jurisdiction of the Supreme Court of the District of Columbia, in patent cases, are the same, as well in equity as at law, as those of the circuit courts of the United States; and whether a case, involving the validity or the infringement of letters-patent, shall be first tried at law is a matter of discretion and not of jurisdiction.
2. The improvement in processes for manufacturing flour, for which reissued letters-patent No. 5,841 were granted to William F. Cochrane and his assignees, April 21, 1874, being a reissue of letters-patent No. 37,317, granted to him Jan. 6, 1863, does not consist in using drafts or currents of air, but in the process as a whole, comprising the application of the blast, and the carrying off the fine impurities whereby the middlings, after being separated from the other parts, are purified, preparatory to regrinding.
3. A process may be patentable, irrespective of the particular form of the instrumentalities used. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but, if the patent is not confined to that particular tool or machine, the use of the other would be an intringement, the general process being the same.
4. A process is a mode of treatment of certain materials to produce a given result. It is an act or a series of acts, performed upon the subject-matter, to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. In the language of the patent law, it is an art.

5. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.

6. The court holds that reissued letters-patent No. 5,841, bearing date April 21, 1874, for improvements in processes for manufacturing flour; No. 6,030, bearing date Aug. 24, 1870; No. 6,594 and No. 6,595, bearing date Aug. 17, 1875, for improvements in machines for bolting flour, and issued to William F. Cochrane and his assignees, — are valid, and were infringed by the defendants, in using machines constructed according to reissued letters-patent No. 5,346, bearing date April 1, 1873, being a reissue of letters-patent No. 135,958, bearing date Feb. 18, 1873, and granted to Edward P. Welch and his assignees, for improvements in middlings-purifiers, and being for improvements upon machines patented to Jesse B. Wheeler and Ransom S. Reynolds; but that letters-patent No. 37,319 and No. 37,320, bearing date Jan. 6, 1863, issued to said Cochrane, for improvements in bolting flour, were not infringed.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court.

Submitted on printed arguments by *Mr. Walter S. Cox*, *Mr. Charles F. Blake*, and *Mr. Rodney Mason* for the appellant, and by *Mr. A. L. Merriman* and *Mr. Howard C. Cady* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit in equity, instituted in the Supreme Court of the District of Columbia for injunction and relief against an alleged infringement of various patents belonging to the complainants. The bill was dismissed, and the complainants have appealed.

The patents sued on are six in number, originally five, granted to the appellant Cochrane on the 13th of January, 1863, and numbered respectively 37,317, 37,318, 37,319, 37,320, and 37,321. They all related to an improved method of bolting flour, the first being for the general process, and the others for improvements in the different parts of the machinery rendered necessary in carrying on the process. Three of the original patents, Nos. 37,317, 37,318, and 37,321, were surrendered, and reissues taken in 1874, which reissues were numbered 5,841, 6,029, and 6,030, the first being for the process, and the other two for portions of the machinery. Reissue 6,029, being in place of the original patent numbered 37,321, was also subse-

quently surrendered, and two new reissued patents substituted therefor, numbered 6,594 and 6,595.

The case has been mainly argued on the question of infringement, the defendants using a bolting apparatus constructed according to letters-patent issued to Edward P. Welch in April, 1873, for improvements upon machines patented to Jesse B. Wheeler and Ransom S. Reynolds, which, as well as the process employed, they contend, are radically different from the apparatus and process of Cochrane.

A preliminary question is raised with regard to the jurisdiction of the court below to hear the case on a bill in equity, before a determination of the rights of the parties in an action at law.

The powers of the Supreme Court of the District of Columbia in patent cases are the same as those of the circuit courts of the United States. See Revised Statutes relating to the District of Columbia, sects. 760, 764.

The circuit courts were first invested with equity jurisdiction in patent cases by the act of Feb. 15, 1819, which declared that these courts should have "original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, should have authority to grant injunctions, according to the course and principles of courts of equity," &c.

This law was substantially re-enacted in the seventeenth section of the patent law of July 4, 1836, and the fifty-fifth section of that of July 8, 1870, special powers to assess damages in equity cases being also conferred by the latter act.

Before the act of 1819 was passed, the circuit courts had cognizance of actions at law brought to recover damages for the infringement of patents, but not of suits in equity in relation thereto, unless the parties happened to be citizens of different States. Phillips on Pat. 379; *Livingston* v. *Van Ingen*, 1 Paine, 54; *Sullivan* v. *Redfield*, id. 447. Under that act and the subsequent acts in which it became incorporated, bills in equity for injunction, discovery, and account have constantly

been sustained, frequently without any previous action at law. As said by Mr. Justice Grier, in a case decided at the circuit, "It is true that, in England, the chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not universal: it is a practice founded more on convenience than necessity. It always rests in the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience, not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact or of legal titles. In the United States, the practice is by no means so general as in England." *Goodyear v. Day*, 2 Wall. Jr. 296. Subsequently, in the case of *Sickles v. Gloucester Manufacturing Co.*, 3 id. 196, the same judge said: "The courts of the United States have their jurisdiction over controversies of this nature by statute, and do not exercise it merely as ancillary to a court of law." And, after quoting the statute, he proceeds: "Having such original cognizance, . . . the courts of the United States do not, in all cases, require a verdict at law on the title, before granting a final injunction, or concede a right to every party to have every issue as to originality or infringement tried by a jury."

The position of Mr. Justice Grier is undoubtedly true, that whether a case shall be first tried at law is a matter of discretion, and not of jurisdiction; and in this matter the courts of the United States, sitting as courts of equity in patent cases, are much less disposed than the English courts are to send parties to a jury before assuming to decide upon the merits.

But the counsel for the defendants suggest that the Revised Statutes have not preserved in entirety the previous enactments on this subject, but have omitted the vesting of original cognizance in the circuit courts sitting as courts of equity in patent cases. From a careful consideration, however, of all the sections of the Revised Statutes on the subject, we think that no intention is evinced to make any change in the law. The original enactments are separated into distinct parts, and somewhat condensed; but the substance of them is retained. By sect. 629, the circuit courts are invested with jurisdiction, among

other things, "Ninth, of all suits at law or in equity arising under the patent or copyright laws of the United States." And, by sect. 4921, it is declared, that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity," &c., following precisely the language used in the act of 1870, the last previous revision of this branch of the law. The grant of jurisdiction is as broad and general as it could well be, and the mode of exercising it is prescribed in precisely the same terms as in previous statutes.

In the present case, we see no special reason for sending the case to a court of law or to a jury for trial. There are no such issues depending upon the credibility of witnesses, or on the intricacy of machinery, as to make the case susceptible of easier solution or greater certainty as to the truth before such a tribunal than it admits of when presented to the consideration of a chancellor. It would, perhaps, be desirable if all cases of this sort could be referred to a commission of intelligent experts and practical men to report their opinion thereon, with their reasons, for the final action of the court. A proceeding of this kind was probably in the mind of Congress in passing the act of Feb. 16, 1875, authorizing a reference to a jury of five persons. Neither courts nor ordinary juries are perfectly adapted to the investigation of mechanical and scientific questions. The court below, however, exercised its discretion to decide the case upon its merits, without the aid of a jury of any sort, and their action is not a ground of appeal. If we were convinced, however, that the case was not properly decided, and could not be properly decided without such a reference, we might undoubtedly, in the exercise of our own discretion, remand it to the court below for that purpose. But we see nothing in the questions raised which require that such a course should be adopted.

The principal patent sued on in this case was granted on the 21st of April, 1874, being a reissue of a patent granted to William F. Cochrane on the 6th of January, 1863. The original patent was numbered 37,317, and the reissue 5,841. The alleged invention is for a process in manufacturing flour. The patentee, in his specification, says: "The object of my inven-

tion was to increase the production of the best quality of flour; and my improvement consisted in separating from the meal first the superfine flour, and then the pulverulent impurities mingled with the flour-producing portions of the middlings-meal, so as to make 'white' or 'purified' middlings, which, when reground and rebolted, would yield pure white flour, which, when added to the superfine, would improve the quality of the flour resulting from their union, instead of deteriorating its quality, as had heretofore been the case when the middlings flour was mingled with the superfine." The process employed for producing the result here indicated is then described. It consists in passing the ground meal through a series of bolting-reels clothed with cloth of progressively finer meshes, which pass the superfine flour and retard the escape of the finer and lighter impurities; and, at the same time, subjecting the meal to blasts or currents of air introduced by hollow perforated shafts furnished with pipes so disposed that the force of the blast may act close to the surface of the bolting-cloth; the bolting-chest having an opening at the top for the escape of the air, and of the finer and lighter particles therewith, through a chamber where the particles are arrested, whilst the floor and sides of each compartment of the chest are made close, so as to prevent the escape of the air in any other direction than through the said opening. By this means, the superfine flour is separated, and the fine and light specks and impurities, which ordinarily adhere to the middlings and degrade the flour produced therefrom, are got rid of; and when the middlings are now separated from the other portions of the meal, they are white and clean, and capable of being reground and rebolted, so as to produce superfine flour equal in quality and even superior to the first instalment.

This is the process described; but the patentee claims that it is not limited to any special arrangement of machinery. He admits the prior use of currents of air in the interior of the reels, introduced by means of hollow, perforated shafts, for the purpose of keeping back the speck, and increasing the quantity of superfine flour; but not for purifying the middlings preparatory to regrinding. His improvement, therefore, does not consist in using drafts and currents of air, but in the process as a

whole, comprising the application of the blast, and the carrying off of the fine impurities, whereby the middlings are purified preparatory to regrinding after being separated from the other parts.

The defendants deny that they use this process. They purify the middlings of the flour, as before stated, by means of machines constructed according to letters-patent issued to Edward P. Welch, in April, 1873, for improvements upon machines patented to Jesse B. Wheeler and Ransom S. Reynolds.

In this process, reels are not used for purifying the middlings, but a flat and slightly inclined vibrating screen or sieve is used for the purpose; over which the ground meal is passed, and whilst passing is subjected to currents of air blown through a series of pipes situated close underneath the screen; which currents pass up through the screen and through an opening at the top of the chest into a chamber, carrying with them the finer and lighter impurities, whereby the middlings are rendered clean and white, and capable of being reground into superfine flour. The bolting-chest is made tight and close on all sides except the opening at the top, so that the currents of air may be forced to escape by that exit.

Now, except in the use of a flat sieve or screen in place of reels, it is difficult to see any substantial difference between these two methods. The defendants use, in addition, brushes, which revolve on the under side of the screen, so as to keep the meshes thereof constantly clean and free; but this is merely an addition, which does not affect the identity of the two processes in other particulars. We have substantially the same method of cleaning the middlings preparatory to regrinding by means of currents of air passed through them whilst being bolted, and whilst being confined in a close chest or chamber, said chamber having an opening above for the escape of said currents of air and the impurities with which they become loaded. The middlings being thus purified are reground and rebolted, producing a superfine flour of superior grade, — a new, useful, and highly valuable result.

The use of a flat screen instead of a revolving reel for bolting and cleaning the middlings is a mere matter of form. It

may be an improved form, and, perhaps, patentable as an improvement; but it is at most an improvement.

The forcing of the air-currents upward through the screen and film of meal carried on it and against the downward fall of the meal, instead of forcing them through the bolting-cloth in the same direction with the meal, is also a mere matter of form, and does not belong to the substance of the process. The substantial operation of the currents of air in both cases is to take up the light impurities and bear them away on the aggregate current through the open flue, and thus to separate them from the middlings. This, too, may be an improvement on Cochrane's method; but it is only an improvement.

The defendants admit that the process has produced a revolution in the manufacture of flour; but they attribute that revolution to their improvements. It may be as they say, that it is greatly due to these. But it cannot be seriously denied that Cochrane's invention lies at the bottom of these improvements, is involved in them, and was itself capable of beneficial use, and was put to such use. It had all the elements and circumstances necessary for sustaining the patent, and cannot be appropriated by the defendants, even though supplemented by and enveloped in very important and material improvements of their own.

We do not perceive that the patent of Cogswell and McKiernan, if valid at all as against Cochrane (a point which will be more fully considered hereafter), affects the question in the least. That patent is not at all for the process which Cochrane claims. If valid, and if, in using his process, Cochrane is obliged to use any device secured to Cogswell and McKiernan, it does not detract in the slightest degree from his own patent. One invention may include within it many others, and each and all may be valid at the same time. This only consequence follows, that each inventor is precluded from using inventions made and patented prior to his own, except by license from the owners thereof. His invention and his patent are equally entitled to protection from infringement, as if they were independent of any connection with them.

That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. If

one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the same. A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.

The machine patents come next to be considered.

As to number 6,030, which is a reissue of the original patent number 37,318, the defendants clearly infringe, at least, the last claim, which is in these words: "In combination with the screen incased in a chest, the perforated blast-pipe and the suction-pipe, arranged to operate on opposite sides of the screen, substantially as set forth."

As to the patent next in order, namely, the original patent number 37,319, which relates specially to the use of what the patentee calls the pump for introducing the meal into the chest and reels, whilst the valve arrangement used by the defendants may be an equivalent in the general combination with the said pump described by Cochrane, yet, taken by themselves, as separate pieces of machinery, they are not the same, and the use of the one is not an infringement of a patent for the other. Curtis, sect. 332; *Foster* v. *Moore*, 1 Curtis, C. C. 279. Nor can we perceive that the defendants infringe the next patent, number 37,320, which is for certain combinations of machinery, including the bolting-reels, dead-air chambers therein, slotted shaft, and reciprocating board for discharging the meal, &c., which it is unnecessary to describe more particularly.

The two remaining patents, numbered 6,594 and 6,595, being reissues of original patent number 37,321, are for combinations of essential parts of the machinery required for bolting flour and purifying the middlings according to the general process described in the first patent. The principal claim of the original patent was for the condensing or collecting chamber, through which the currents of air, on leaving the bolting-chest, make their escape, and where they leave the fine particles with which they become loaded. This claim, it is said, was found to be too broad, inasmuch as a collecting chamber, somewhat similar, had been used in another connection, though not in the combinations presented in Cochrane's bolting process. The original patent, therefore, was surrendered, and the two patents now under consideration were issued in place thereof, claiming the use of the collecting chamber in combination with the various material parts of the bolting apparatus. The reissue, number 6,594, contains three claims, and number 6,595, one claim.

The first claim of reissue number 6,594 is for the collecting chamber (used for the purpose aforesaid) in combination with the bolter, air-pipes, and valves for feeding and delivering the meal without allowing the air to pass therewith. Now, although the defendants use a flat bolter instead of a reel, and use different kinds of valves for feeding and delivering the meal without allowing the air to pass, yet they employ the combination of devices described in this claim. They use the collecting chamber for the same purpose as that pointed out in the patent, and use it in connection with a bolter, air-pipes, and valves for feeding and delivering the meal without allowing the air to pass therewith, each effecting the same separate purpose, and all combined effecting the same general purpose, which the like parts are intended to accomplish in Cochrane's bolting apparatus. Though some of the corresponding parts of the machinery, designated in this combination, are not the same in point of form in the two bolting apparatuses, and, separately considered, could not be regarded as identical or conflicting, yet having the same purpose in the combination, and effecting that purpose in substantially the same manner, they are the equivalents of each other in that regard. The claim

of the patent is not confined to any particular form of apparatus, but (in regard to the valves, for example) embraces generally any valves for feeding and delivering the meal without allowing the air to pass through. We are of opinion, therefore, that the combination here claimed is infringed by the apparatus used by the defendants.

It is unnecessary to make a separate examination of the other claims embraced in the two patents under consideration. They are all susceptible of the same observations which we have made with regard to the first claim. In our opinion, the defendants do infringe them.

But a question is raised with regard to Cochrane's priority of invention. A patent was granted on the 12th of June, 1860, to Mortimer C. Cogswell and John McKiernan for improvements in ventilated bolting-chests, which, it is contended, antedates and nullifies Cochrane's apparatus as patented to him in the original patent 37,321, and in the two reissues thereof before mentioned. This patent (of Cogswell and McKiernan) we have examined, and find that it does contain five of the elements embraced in those reissues; namely (besides the bolting-chest and bolter, which are always used), it contains the perforated air-pipe extending inside of the bolting-reel, the fan for producing a blast of air therein, and a collecting-chamber for arresting the flour carried off by the blast. The purpose was simply to cool the meal and keep the bolting-cloths dry. The flour which collected in the chamber was returned to the chest. The parts contained in this apparatus are those which are patented in combination in Cochrane's reissue 6,595, which was separated, it is said, from reissue 6,594 on account of this patent of Cogswell and McKiernan. The combinations patented in reissue 6,594 embrace other parts not contained in Cogswell and McKiernan's patent; and the defendants contend that this reissue is void, as not being sustained by the original patent 37,321.

The latter position, we think, is untenable. Cochrane's apparatus, as exhibited in his model, and described in his original patent, and in the series of patents taken out at the same time, all having relation to the same general process, and referred to in patent 37,321, contained all the parts which go to make the

combination claimed in reissue number 6,594. We see no reason, therefore, why such reissue was not properly granted to him by the Patent Office, the claim being, in fact, a much narrower one than that of the original patent.

The same observations apply to reissue number 6,595. But, as to that, as before stated, the particular elements of the combination claimed in it are found in Cogswell and McKiernan's machine; and if this is entitled to the precedency over Cochrane's, reissue number 6,595 is void. He contends that it is not entitled to such precedency; but that, in fact, Cogswell and McKiernan surreptitiously obtained a patent for his invention. We have examined the evidence relating to this matter, and are satisfied that the improvement claimed by Cochrane was his invention; that Cogswell and McKiernan obtained their knowledge of it from him; and that there is nothing connected with their patent which ought to invalidate the reissued patent in question.

A French patent, dated 27th of September, 1860, granted to one Perigault, is also referred to as anticipating the combinations in these patents. But it being shown that Cochrane's invention was actually made before that date, the point was not pressed in the argument. By the act of 1870, a foreign patent, in order to invalidate an American patent, must antedate the invention patented.

Our conclusion is, that the patent for the process, being reissue number 5,841, and the several reissued patents for combinations of mechanical devices, numbered respectively 6,030, 6,594, and 6,595, are valid patents, and are infringed by the defendants; and that the other two patents named in the bill of complaint, numbered respectively 37,319 and 37,320, are not infringed by the defendants.

Decree reversed, and cause remanded with directions to enter a decree for the complainants, and to proceed therein in conformity with this opinion.

MR. JUSTICE CLIFFORD, with whom concurred MR. JUSTICE STRONG, dissenting.

I dissent from the opinion and judgment of the court in this case, for the following reasons: —

1. Because the mechanical means employed by the respondents to effect the result are substantially different from those described in the complainants' patent.

2. Because the process employed by the respondents to manufacture the described product is materially and substantially different from the patented process employed by the complainants.

3. Because the respondents do not infringe the combination of mechanism patented and employed by the complainants. *Prouty* v. *Ruggles*, 16 Pet. 341; *Vance* v. *Campbell*, 1 Black, 428; *Gill* v. *Wells*, 22 Wall. 26.

4. Because the respondents do not infringe the process patented by the complainants, the rule being, that a process, like a combination, is an entirety, and that the charge of infringement in such a case is not made out unless it is alleged and proved that the entire process is employed by the respondents. *Howe* v. *Abbott*, 2 Story, C. C. 194; *Gould* v. *Rees*, 15 Wall. 193.

DAVIS v. INDIANA.

1. The Supreme Court of Indiana having decided in this case that the moneys arising from section 16 in each congressional township of that State, all of which are to be paid into the county treasury by the school trustee, form a part of the school fund which the county auditor is required to distribute to the various townships in the county, and that, in so doing, he is bound by the proviso in the act of March 4, 1855, "that in no case shall the congressional township fund be diminished by such distribution, and diverted to any other township," this court affirms the decision.
2. This court adheres to the ruling in *Springfield Township* v. *Quick*, 22 How. 56, that the right of the inhabitants of the several congressional townships in that State to such moneys for the use of schools in the township where section 16 lies is sufficiently protected by that proviso.

ERROR to the Supreme Court of the State of Indiana.

The case is stated in the opinion of the court.

Submitted on printed arguments by *Mr. Ralph Hill* for the plaintiff in error, and by *Mr. S. Stansifer*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

The Congress of the United States, in the act admitting Indiana as a State, declared that every sixteenth section of a

township, according to the legal subdivisions of the public lands lying within that State, should be appropriated for the use of schools within the township.

An act of the legislature of the State, prior to 1854, directed that the money derived from these sixteenth sections should be mingled with school moneys, derived from taxation and various other sources, into a common fund, and should be apportioned among the counties of the State, according to an enumeration of the pupils in each county. As this might have resulted in the diversion of some of the money derived from the congressional grant to the schools of other townships than that in which the land lay, it was, in a proper suit, declared by the Supreme Court of the State to be invalid. *State* v. *Springfield Township*, 6 Ind. 83.

An act was accordingly passed, in March, 1855, providing anew for the distribution of this common fund, which contained this proviso: "That in no case shall the congressional township fund be diminished by such distribution, and diverted to any other township."

Under this act, while the whole fund derived from the interest on the proceeds of the sale of these lands, or the rent of them if unsold, could not be diminished or diverted to schools in other townships, the common fund arising from other sources was so distributed as to equalize the whole among the schools of all the counties; that is, if a township had an ascertained sum arising from the sixteenth section, it received none of the school fund derived from other sources until all other townships had received from those other sources an amount which made them equal to that sum, having regard to the number of pupils, as ascertained by the legal census.

The same township of Springfield brought another suit to test the validity of this act; and the Supreme Court of Indiana having affirmed it, 7 Ind. 636, the township brought the case to this court, on the ground that the act of the legislature was in conflict with the act of Congress. This court, while holding that it was the intent of the act of Congress that the money arising from the sixteenth section should be used only for schools within the congressional townships where the section lay, was of opinion that the proviso we have cited from the

Indiana statute sufficiently protected the right of the people of the township, and that it was competent for the legislature of Indiana to place the people of other townships on an equality with them in regard to educational means, out of funds of the State derived from other sources, and that in so doing they did not violate the conditions of the trust on which the State received those lands. *Springfield Township* v. *Quick*, 22 How. 56.

There seems to have been no further trouble in this matter, until, by an act of the legislature of 1873, the school trustee, who was treasurer of the township, and who had previously collected and distributed the money arising from this school section, was directed to pay all the money so received by him into the treasury of the county. The present plaintiff in error refused to do this, and, being sued by the proper county officers for the money in his hands, set up in defence that the act requiring him to do so was void.

The ground on which this proposition is supported by counsel is, that there is no provision of law in Indiana by which this money, when paid into the county treasury, can be withdrawn, or if withdrawn, can be applied to the use of schools in the proper congressional township.

It is not contended by counsel that the legislature of Indiana could not provide as it might deem best for the custody of this money, nor is it argued that a similar power could not be exercised as to the proper officer to make distribution of it, and direct its expenditure. The whole argument rests on the assumed results of the Indiana statutes, that while the school trustee, who is treasurer of the school board, was by the law, as it stood prior to 1873, authorized to collect and distribute the fund, he is now directed to pay it into a treasury where it cannot, by law, be distributed as the act of Congress requires. It is, therefore, argued that this amendatory law is void, and that the trustee has still the right to collect and distribute the money, and cannot be made to pay it into the county treasury.

The Supreme Court of Indiana, in the opinion, which is a part of the record in this case, have decided that the school laws of that State do authorize the auditor of each county to distribute the school fund in the county treasury to the different townships in the county, and that in doing so he is bound by

the proviso we have already cited, which preserves to each congressional township the funds arising from the sale of the sixteenth section; and they also decide that the money paid into the county treasury by the school trustee, arising from that section, is a part of the fund which the auditor is to apportion, subject to that proviso. That court, as it will be seen, construes the statute of its own State in a manner which this court has already decided to be in harmony with the act of Congress; and we are asked by counsel to decide that the Supreme Court of Indiana, in thus construing the statute, is in error; and to make a construction of it, by which it will conflict with the act of Congress, and be, therefore, void, merely that one officer may have distribution of the fund instead of another.

Our convictions should be very clear before we do this, even if we have the right to do it, which may admit of some question.

Fortunately, we concur in the view of these laws taken by that court.

The school laws of the State are voluminous and complex, and are all referred to in the briefs. A full examination of them is unnecessary here.

Sect. 118 provides that —

"The auditor of each county shall, on, &c., make apportionment of the school revenue to which his county may be entitled, to the several townships, towns, and cities of his county, which apportionment shall be paid to the school treasurer of each township and incorporated city or town by the county treasurer; and, in making the apportionment and distribution thereof, the auditor shall ascertain the amount of the congressional-township school revenue belonging to each city, town, and township, and shall so apportion the other school revenue for tuition to each city, town, and township, as near as may be, according to the enumeration of children therein: *Provided, however*, that in no case shall the income of the congressional-township fund, belonging to any congressional township, or part of such township, be diminished by such apportionment, or diverted or distributed to any other township, and report the amount apportioned to the State superintendent of public instructions, verified by affidavit."

We have here the proper authority for the apportionment and distribution of the school fund in the county treasury which

shall be paid to the school treasurer of each township. This school treasurer is the very officer who has collected and paid this fund into the treasury of the county under the amendment of 1873.

The argument is that this section only applied to the school fund from other sources, and could not apply to this, because it was not payable into the county treasury when the section was enacted.

But let us suppose that the legislature had by statute increased the fund in the county treasury from other sources, as by giving to it some penalty for violation of a new statute, would it require an express provision to authorize the auditor to apportion that with what the treasurer was receiving before? The question answers itself. The fund — the whole fund in the county treasury devoted to the use of schools — was to be apportioned, and if the fund arising from the sixteenth section becomes a part of it, it must be distributed. And the statute carefully provides, that, in making that distribution, the appropriation of the sixteenth section to the schools of the township shall be strictly observed.

It is unnecessary to protract the argument, for we fully concur with the opinion of the Supreme Court of Indiana construing their own statute. *Judgment affirmed.*

MELENDY v. RICE.

Where the judgment of the highest court of a State is here for re-examination, the Federal question, which, it is claimed, arises in the record, will be considered here as it comes from that court. Whe' therefore, the point there arising was whether the evidence in the record sustained a finding of fact upon which the judgment of an inferior court had been entered, and the appellate court was permitted by its rules to set aside the judgment as against the weight of evidence only where there was no evidence to support it, or such an absence of evidence that it might be presumed to have been given through the influence of prejudice, passion, or favor, this court will not, upon a question of preponderance of testimony alone, reverse the judgment of the latter court. *So held*, where the question below was, whether a party, when he purchased property, had reasonable cause to believe that his vendor was insolvent, and was making the sale in fraud of the bankrupt law.

ERROR to the Supreme Court of the State of Iowa.

Rice sued Melendy and others in the Marshall County, Iowa, District Court, for wrongfully and forcibly entering his store and carrying away goods. Melendy justified as marshal of the United States for the district of Iowa, claiming that he seized the goods as the property of Clark & Freer, bankrupts, under a provisional warrant of seizure issued from the Bankrupt Court after the adjudication in bankruptcy. Rice claimed that he purchased the property from Clark & Freer before their bankruptcy. Melendy insisted that the sale was in fraud of the bankrupt law; and the case turned upon the single question whether Rice, when he purchased, had reasonable cause to believe that Clark & Freer were insolvent. The trial below was by a referee, and he found in favor of Rice. Minutes of the testimony taken by the referee were filed with his report. In accordance with the practice in Iowa, a judgment was entered in vacation by the clerk, such as was recommended by the referee. At the next term, a motion was filed to set aside the report of the referee and vacate the judgment which had thus been entered, and, among other causes assigned, was one to the effect that the referee erred in finding from the testimony that Rice, when he purchased, did not have reasonable cause to believe that Clark & Freer were insolvent. This motion was overruled, and the judgment affirmed as entered.

From this judgment of the District Court an appeal was taken to the Supreme Court of the State, where the same finding was assigned for error. That court affirmed the judgment below. A rehearing was then had, with the same result. The case is now here upon a writ of error issued under sect. 790, Rev. Stat., and there is the same assignment of error.

Mr. George G. Wright for the plaintiff in error.
Mr. Thomas J. Henderson, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Whenever the judgment of the highest court of a State is brought here for the re-examination of some decision of a Federal question, we must consider the question as it comes to us from that court. This record shows that the question below was whether a finding of fact by a referee should be set aside

because not sustained by the evidence. Upon writs of error to the courts of the United States, we cannot be called upon to decide such a question, because the finding of the court below as to facts is conclusive upon us. *Norris* v. *Jackson*, 9 Wall. 127; *Insurance Company* v. *Sea*, 21 id. 160. But in Iowa a different practice prevails, and our rule has been so far, and only so far, relaxed as to permit the Appellate Court to set aside a judgment of an inferior court, because against the weight of the evidence, when there is no evidence whatever to support it, or when there is such an absence of evidence that it may be presumed to have been given through the influence of passion, prejudice, or favor. *Rice* v. *Melendy*, 41 Iowa, 400; *Wilson* v. *B. & M. R. Railroad Co.*, 33 id. 592; *Starker* v. *Leese & Mahone*, id. 595; *Pearson* v. *Minturn*, 18 id. 87; *Bellamy et al.* v. *Doud*, 11 id. 255. The judgment must be clearly and manifestly wrong.

Applying even this relaxed rule to the present case, we are satisfied that the judgment of the Supreme Court of the State ought not to be reversed. The question is one of preponderance of testimony alone. It certainly cannot be said there is no evidence in the case to support the finding, and, after three judgments of affirmance in the courts below, hardly any thing short of that would justify a reversal here.

Judgment affirmed.

AMERICAN BRIDGE COMPANY *v.* HEIDELBACH.

1. A company, to secure the payment of its bonds, mortgaged its property, and the rents, issues, and profits arising therefrom, with the provision, that, if there was default in paying the interest, the mortgagee might take possession of the property, manage the same, and receive and collect all rents and claims due and to become due to the company. Default was made; and the mortgagee, in November, 1874, filed his bill, setting forth that the company had on hand moneys and claims due to it, both of which he prayed might be applied to his mortgage. An execution upon a judgment, which B. had against the mortgagor, having been sued out and returned *nulla bona*, he, in December of that year, filed his bill to subject such moneys and claims to the payment of his judgment. *Held*, that, inasmuch as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing his bill must be postponed to that of B.
2. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, and *Gilman et al.* v. *Illinois & Missouri Telegraph Co.*, 91 U. S. 603, cited and approved.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. Wallace Pratt* and *Mr. C. B. Lawrence* for the appellant, and by *Mr. R. Crozier, contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

The controversy in this case has arisen out of a mortgage executed by the Kansas and Missouri Bridge Company to the appellees, as trustees, to secure the payment of the principal and interest of certain bonds issued by the mortgagor and described in the mortgage.

Besides the bridge of the company, the mortgage included "the rents, issues, and profits of said bridge, as far as the same are not required to pay the necessary expenses of keeping in repair and operating said bridge, which rents, issues, and profits," it was declared, "are hereby pledged to the payment of said interest as it matures, and to the establishment of a sinking fund for the redemption and payment of the principal of said bonds," &c. It was further provided, that, if the interest were in default for six months, the trustees, upon the written request of the holders of one-half of the outstanding bonds, might take possession of the mortgaged premises, manage and operate the bridge, and receive and collect all rents and claims due and to become due to the company.

The interest upon the bonds being in default, the trustees, on the 25th of November, 1874, filed their bill, wherein, among other things, they set forth that there was in the hands of the company a certain amount of money which ought to be applied upon the mortgage and certain claims due to the company, the proceeds of which ought to be applied in like manner. The bill prayed accordingly.

The appellant, the American Bridge Company, held a judgment for $15,485.88 and costs against the Kansas and Missouri Bridge Company, upon which an execution had been returned *nulla bona*. On the 11th of December, 1874, the judgment creditor filed a bill claiming priority of payment out of the money and the proceeds of the claim above mentioned. It

appears that there is a sufficient fund to meet the demand awaiting below the termination of this litigation.

It cannot be denied that the return of the execution, the filing of the bill, and the service of process, gave the judgment creditor a lien upon the fund in question which must prevail, unless the mortgagees have shown a paramount right to it. *Miller* v. *Sherry*, 2 Wall. 249; 2 Barb. Ch. Pr. (2d ed.) 157, note 13. The question as to the right claimed by the trustees is conclusively settled against them by *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, and *Gilman et al.* v. *Illinois & Missouri Telegraph Co.*, 91 U. S. 603.

Both these cases, as regards this point, present exactly the same legal aspect as the case before us. It is unnecessary to reproduce at length what was said in those adjudications.

In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed, and possession delivered to him. In either case, the income would thereafter have been theirs. Until one or the other was done, the mortgagor, as Lord Mansfield said in *Chinnery* v. *Black*, 3 Doug. 391, was "owner to all the world, and entitled to all the profit made."

The mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already. The bill of the trustees is as ineffectual as if the fund were any other property, real, personal, or mixed, acquired by the mortgagee *aliunde*, and never within the scope of the mortgage.

Decree reversed, and cause remanded with directions to enter a decree in conformity to this opinion.

TOWN OF EAST LINCOLN v. DAVENPORT.

1. In a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons annexed to bonds issued by it, under authority conferred by law, questions of form merely, or irregularity, or fraud, or misconduct on the part of its agents, cannot be considered.
2. Where an act of the legislature, authorizing a town to subscribe to the capital stock of a certain railroad company, provides, that if a majority of the legal voters, voting at an election held for that purpose, shall be found to be in favor of such subscription, it shall be deemed and held that such town had taken stock in said company according to the proposals made, — *Held*, that the statute makes such a majority vote equivalent to, and a substitute for, a subscription by the town upon the books of the company.
3. Where it was provided by a general law, or the charter of the company when such subscription was made, that the company might consolidate with other companies, in order to carry out the object of its charter, and that its franchises, rights, subscriptions, and credits might be transferred, and where such consolidation was effected, and a subsequent transfer by the consolidated company was lawfully made to a new company engaged in the construction of a connecting road, thus forming a continuous line, the stockholders in the former companies becoming stockholders in the new company, — *Held*, that a delivery by the town to such new company of the bonds for the payment of the original subscription, and a receipt of a certificate of stock in it, were warranted by law.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. J. M. Palmer* for the plaintiff in error, and by *Mr. S. M. Cullom* for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

The question is as to the legality of certain bonds issued by the town of East Lincoln, bearing date of the second day of April, 1873.

The case shows that the plaintiff below was the *bona fide* owner of the coupons sued upon. Questions of form merely, or irregularity, or fraud, or misconduct on the part of the agents of the town, cannot, therefore, be considered. Whether the supervisor of the town signed the bonds during the midnight hours, whether he delivered them at about daylight on the morning of April 2, 1873, and whether he immediately left

the town to avoid the service of an injunction, are matters not chargeable to the owner of the bonds. The supervisor was not his agent, but the agent of the town, and if there has been misconduct on his part, the town rather than a stranger must bear the consequences. There must be authority in the town to issue the bonds by the statutes of the State. If this cannot be found, the holder must fail; if it exists, he is entitled to recover.

It is denied that a subscription was made by the town to the stock of the Havana, Mason City, Lincoln, and Eastern Railway Company; and it is found as a fact by the judge who tried the action, that "no subscription was ever made by the town of East Lincoln on the books of" the railway company.

The bonds recite that they are issued in pursuance of the authority given at an election by the voters of said town, held on the thirty-first day of May, 1870, in pursuance of the authority of two several statutes referred to in said bonds.

The fifth section of the act of March 27, 1869, amendatory of the act of March 9, 1867 (both statutes are referred to in the bonds), prescribes the manner in which the election shall be held, and the record shows that, on the thirty-first day of May, 1870, an election was held under said act, and that a majority of the legal voters attending and voting at said election voted in favor of a subscription of $60,000 to the capital stock of the said company. That section provides "that if a majority of the legal voters of such town, . . . voting at such election, shall be in favor of such subscription, then it shall be deemed and held that said town . . . has taken stock in said railroad company according to the proposals made in said petition to said clerk."

We are aware of no legal restriction upon the power of the legislature to declare what shall amount to a subscription to stock in an incorporated company, or what shall be the evidence that the party proposing to take the stock has completed the contract on its part. It may require such evidence to be in writing upon the books of the company, under the authority of the officers of the town, or it may authorize it to be done by an order or resolution of the county court, or it may authorize an

engagement to take stock to be made by parol, or, as in the case before us, it may provide that the expressed wish of the voting majority of its inhabitants, at a legally convened town-meeting, shall amount to a subscription, or shall be deemed and held to be a taking of the stock of the company. *Nugent* v. *The Supervisors*, 19 Wall. 241.

We think the statute intended to make a majority vote of the legal voters of the town who voted at such an election an equivalent to and substitute for a subscription upon the books of the company.

The subscription thus authorized has been accepted by the successors of the said corporation, and, so far as the record shows, by the original corporation.

In our opinion, the subscription thus made was valid.

If valid as a subscription to the original incorporation, has it lost its force and vitality in consequence of the changes which have taken place in the organizations concerned in this transaction? The corporation known as the Havana, Lincoln, and Champaign Railroad Company was organized under the act of March 9, 1867, creating a company to construct a railroad from Ipava, in Fulton County, to Havana, Lincoln, Clinton, and Champaign, and from the latter place to some point on the Toledo, Wabash, and Western Railway. The corporation was authorized to unite or connect with any other railroad then or thereafter running east and west, and full power was given to lease, purchase, and make all such contracts as would secure the object of such connection. The act of March 27, 1869, amended that act by changing the name of the company to Havana, Mason City, Lincoln, and Eastern Railway Company.

By the acts of Feb. 21, 1861, and Feb. 16, 1865, the Monticello Railroad Company was chartered, with power to build a road from Champaign, by the way of Monticello, to Decatur, all in the State of Illinois. It was authorized to transfer all its stock, property, immunities, and franchises to any other corporation whose line intersected its road, and who would complete the same. On the twenty-eighth day of June, 1872, this company and the other above mentioned entered into articles of consolidation, merging the two companies into one, which was invested with all the powers, franchises, rights, immunities,

property, and privileges of either or both of the former companies, and transferring all contracts and obligations, certificates, bonds, &c. The consolidation was made with all the forms and solemnities required by law. The consolidated company assumed the name of one of the companies, — the Havana, Mason City, Lincoln, and Eastern Railway Company.

On the 20th of July, 1869, still another corporation, chartered to construct a railroad from Danville to Pekin, was consolidated with the Indianapolis, Crawfordsville, and Danville Railroad Company, under the name of the Indianapolis, Bloomington, and Western Railway Company.

In its course to the eastern boundary of the State of Illinois, this road passed through Urbana and Champaign City, two places mentioned in the former charters named.

By the seventh section of its charter, this corporation was given power to unite or connect itself with any other railroad company in the State, and to lease or purchase such other roads, and to "become vested with all the rights and franchises of such road so leased or purchased, in the right of way, maintenance, and construction thereof."

On the twenty-eighth day of June, 1872, the consolidated company known as the Havana, Mason City, Lincoln, and Eastern Railway Company entered into an arrangement with the Indianapolis, Bloomington, and Western Railway Company, by which there was transferred to the latter the railroad rights of way of said consolidated company, together with all demands, moneys, subscriptions, things in action, privileges, immunities, credits, rights, choses in action, especially naming the subscriptions, of which the one in question is a part. Certain covenants and agreements on the part of the grantee are set forth, of which the completion of the road from Havana to White Heath within two years was one; and, upon failure so to complete, it was agreed that the road should revert to its former owners. The stockholders of each company were made stockholders in the new, to the same amount as in the old, company.

This contract was carried into effect without delay, the roads were consolidated and completed, as therein provided for; and assuming that, as the successor and assignee of the Havana and Mason City Company, the Indianapolis, Bloomington, and

Western Railway Company was entitled to the completion of the contract of subscription made by the election before described, the supervisor of the town of East Lincoln did, on the 2d of April, 1873, deliver the town bonds for the amount of such subscription, and receive a certificate of stock in the latter company to the same amount.

We hold this action to have been warranted both by a fair construction of the statutes and by the decisions of this court. Every substantial result contemplated for the benefit of the towns by the subscription made has been accomplished. A continuous line of railway, crossing the State of Illinois from east to west, beginning at Havana, on the Illinois River, and reaching Danville, on its eastern border, has been completed, and is in operation. This part of the road is as nearly in a direct course to the east as it could well have been made; and, commencing at Havana, running easterly, terminates at a point originally contemplated, and then connects with roads leading to the east and to the north and south.

The statutes we have referred to indicate that the legislature supposed that such consolidation and agreements as were here made might be necessary. If the company first organized could not of itself build the road, it might combine with any intersecting or connecting road from which it could hope for aid. The arrangement with the Monticello road promised fairly, and, so far as we can discover, was of service in obtaining the completion of the road.

If the first arrangement did not affect the purpose of finishing the road, an arrangement, by way of sale or otherwise, to still another company was authorized. Thus the transfer to the Bloomington, Indianapolis, and Western Railway Company was made, and by means of it the great object — the building of a connecting and operating railroad from Havana to the eastern boundary of the State — was attained.

All this was provided for in the charter of the original company, to which the town subscription was made, and the subscription was made with the knowledge of the town that new organizations might be made, and that the subscription was liable to be transferred to and its stock to become that of another company. The statutes were no doubt in accordance with the

public wish at the time of their passage, the evident principle being to give every facility and aid, by the means suggested, to obtain a line of completed railroad to the eastern boundary of the State. Subsequent events have given more prominence to the question of paying the bonds than it then had.

The case falls directly within *Nugent* v. *The Supervisors*, *supra*, which holds that a subscriber is released from his subscription by a subsequent alteration of the organization and purposes of the company only when the alteration is a fundamental one, not contemplated either by the charter of the company or the general statutes of the State. The statute authorizing the alteration of the charter in that case closely resembled the statute we have above quoted in relation to the roads in question.

To the same general effect are *County of Callaway* v. *Foster*, 93 U. S. 567, and *County of Scotland* v. *Thomas*, *supra*, p. 682. The decision in *Harshman* v. *Bates County*, 92 U. S. 569, does not interfere with this principle. The distinction is clearly shown by Mr. Justice Bradley, who pronounced the opinion in each of the last two cases. The like remarks are applicable to *Marsh* v. *Fulton*, 10 Wall. 677, and they show that that decision does not affect the questions here discussed.

Judgment affirmed.

SULLIVAN v. PORTLAND AND KENNEBEC RAILROAD COMPANY.

A railroad company, on the 30th of April, 1850, mortgaged to trustees a specifically described portion of its road to secure certain certificates of indebtedness bearing interest at the rate of ten per cent per annum. Subsequent mortgages, covering the entire line of road, were made. As the work progressed, the company issued certificates of preferred stock, on which dividends of ten per cent per annum were to be paid. In October, 1852, the company made a proposition to waive, until Nov. 1, 1870, its right to redeem at pleasure the portion of its road first mortgaged, provided the holders of the certificates of indebtedness would, by indorsement thereon, authorise the trustees, after paying the holders three per cent semiannually on the said certificates, to pay over semiannually to the treasurer of the company, for its use and benefit, the balance of the income (for interest) which the stockholders were then entitled to receive, viz., two per cent, to be held by him, and appropriated, as far as might be required, or as the same might go, to the payment of interest to such preferred stockholders as should surrender their old certificates and receive new

certificates of preferred stock, bearing three per cent interest or income semi-annually in lieu of five per cent, as then stipulated. The company authorized the president to issue such new certificates of preferred stock, and to waive the right to redeem. None of the holders of the preferred stock accepted the proposition until Sept. 1, 1858. The trustees of the second mortgage foreclosed; the bondholders formed a new corporation, and have operated and owned the road since November, 1862. The holders of the new certificates of preferred stock filed their bill, Feb. 21, 1871, to recover the four per cent per annum relinquished under the first mortgage. On final hearing, the bill was dismissed. *Held*, 1. That there is no privity between the complainants and the new corporation. 2. That there was no privity between the holders of the certificates under the first mortgage and the preferred stockholders. 3. That the defence of the Statute of Limitations not having been set up by plea or answer, the case in that aspect cannot be considered. 4. That as the complainants, if they could recover the moneys claimed, would be entitled to discovery and an account, the objection that they have a remedy at law is not available. Where such an objection lies, it is the duty of the court *sua sponte* to take notice of it, and give it effect. 5. That it is not necessary, in order to let in a defence that the claim is stale, that a foundation should be laid by any averment in the answer. Where the facts disclose laches and neglect on the part of the complainant, the court will refuse relief.

APPEAL from the Circuit Court of the United States for the District of Maine.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. A. G. Stinchfield* for the appellant, and by *Mr. James W. Bradbury* for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The Kennebec and Portland Railroad Company was authorized to build a railroad from Portland to Augusta, both in the State of Maine.

On the 30th of April, 1850, that portion of the road between North Yarmouth and Portland, about twelve miles in length, was mortgaged to Ruel Williams, John Patten, and J. B. Carroll, trustees, to secure the payment of $202,400 advanced to the company by the *cestuis que trust*. The debt was represented by certificates bearing interest at the rate of ten per cent per annum.

On the 1st of November, 1850, the company mortgaged the whole line of the road to the commissioners of the sinking fund to secure $800,000 lent to the company by other parties.

On the 17th of October, 1851, the road and franchises were

mortgaged to John Patten, Joseph McKeen, and M. S. Hagar, in trust to secure bonds issued by the company to the amount of $230,000, known as first mortgage bonds.

On the 15th of October, 1852, the road and franchises were mortgaged to the same trustees to secure the payment of a further issue of bonds to the amount of $250,000, known as the second mortgage bonds.

In the progress of the work on the road, the company issued certificates of preferred stock, known as old preferred stock, to the amount of $240,000. On this stock dividends of ten per cent per annum were to be paid. Two hundred thousand dollars of it in amount is averred to be still outstanding.

On the 7th of October, 1852, a proposition was made by the company to the following effect: —

The company was to waive its existing right to redeem at pleasure its road from North Yarmouth to Portland, and to make it irredeemable until Nov. 1, 1870, provided the holders of the certificates of indebtedness would, by indorsement thereon, authorize the trustees, after paying the holders three per cent semiannually upon the amounts severally represented by such certificates, "to pay over semiannually to the treasurer of the company, for the use and benefit of the company, the balance of the income (for interest) which the stockholders are now entitled to receive (viz., two per cent), to be held by him and appropriated, as far as may be required, or as the same may go, to the payment of interest to such preferred stockholders as shall surrender their old certificates of stock and receive new certificates of preferred stock bearing three per cent interest or income semiannually, in lieu of five per cent, as now stipulated; said payment of three per cent to the holders of said certificates and of the balance aforesaid to the treasurer by said trustees semiannually, to be in full of the annual income of ten per cent to which said certificate holders are now entitled."

It was ordered by the company, that if the proposed arrangement should be made with the North Yarmouth certificate holders, the fund thereby saved should be applied in payment of the dividends accruing on the new certificates of preferred stock, as also proposed.

Authority was given to the president of the company to issue such new certificates of preferred stock, and to waive the right to redeem the North Yarmouth road until Nov. 1, 1870, the time named in the proposition.

None of the holders of the preferred stock accepted this proposition until Sept. 1, 1858. The first new certificate bears date on that day. The other certificates were issued subsequently.

On the 16th of December, 1858, the company ordered three per cent to be paid on the 1st of January then next to all the holders of the new certificates for the preferred stock.

The company became hopelessly insolvent. The trustees of the second mortgage foreclosed that mortgage. The foreclosure was perfected and became absolute in May, 1862. In November, 1862, the bondholders under that mortgage formed a new corporation, by the name of the Portland and Kennebec Company. The trustees conveyed to this company. The company went into possession, and has since been in possession and operated the road, and claimed to own it.

This bill is filed by the complainants as holders of the new certificates of preferred stock, for themselves and in behalf of the other holders not before the court.

The claim is to recover the four per cent per annum relinquished by the North Yarmouth holders of certificates of indebtedness, pursuant to the proposition of the original company, and which proposition was also to give to the holders of the new certificates of preferred stock what is claimed by this bill.

The Circuit Court, properly, as we think, decreed against the complainants, and dismissed the bill. They have brought the case before this court for review.

In the argument here they have insisted that the process whereby the foreclosure of the second mortgage was effected was irregular, without warrant of law, and void; and that if this were not so, the complainants upon the other facts of the case are entitled to the relief sought.

The first proposition is conclusively negatived by the judgment of the Supreme Judicial Court of the State. *The Kennebec & Portland Railroad Co.* v. *The Portland & Kennebec Railroad Co. and Others*, 59 Me. 20.

Nothing more need be said upon that subject.

There is no privity between the complainants and the new corporation. The agreement or arrangement relied upon was made with the Kennebec and Portland Railroad Company. The Portland and Kennebec Railroad Company was not in existence when it was entered into.

There is no ground for insisting that the latter succeeded to this liability of the former. The new company did not take the property with any such *onus*. The liability rested wholly on the contract of the parties by whom it was made. It did not run with the property into the hands of those who acquired it by the foreclosure. They did not assume the liability expressly or by implication. Hence neither they, nor those claiming under them, are in any wise bound. The foundation of the claim as to both is *res inter alios acta*.

Nor was there any privity whatever between the North Yarmouth creditors and the preferred stockholders. Whether the stockholders did or did not receive what was surrendered by the creditors, did not affect or concern the latter. The moneys surrendered were to be paid over "semiannually to the treasurer of this company for the use and benefit of this company." With such payment the duties of the trustees terminated. Thereafter the company was to apply the fund for the benefit of such of the stockholders as should comply with the condition prescribed. There were two distinct propositions. One to the debt-holders, the other to the stockholders. The latter could get nothing unless the former accepted. But the acceptance of the former had no relation to the acceptance of the latter. After the former accepted, the latter still had the option to accept or refuse. The indorsement required to be made by the debt-holders upon their certificates did not refer or relate to the stockholders. When the arrangement between the old company and the debt-holders was complete, it was equally effectual and conclusive upon those parties, whether the preferred stockholders did or did not thereafter take any action. There was no assignment or transfer of any interest in the mortgage. There was simply a release and extinguishment of so much of the liability secured, and, by consequence, of the lien and existence of the mortgage to that extent.

Thereafter the liability and the mortgage were as if they had never been for any thing more. The new company acquired the ownership of the road, and its entire income, subject only to the pre-existing mortgages. The source whence the fund in question was to flow was destroyed by the foreclosure. When the latter was complete the former ceased to exist, and thenceforward was as if it had never been.

The defence of the Statute of Limitations is not set up by plea nor in the answers. We cannot, therefore, consider the case in that aspect. *Wilson* v. *Anthony*, 19 Ark. 16.

The objection that there is a remedy at law is only available where such remedy is as plain, adequate, and effectual as the remedy in equity. *Boyce's Executors* v. *Grundy*, 8 Pet. 215. Here, if the complainants could recover the moneys claimed, they would be entitled, also, to discovery, and an account.

Where this objection lies, it is the duty of the court, *sua sponte*, to take notice of it and give it effect. There is, in such cases, a constitutional right to a trial by jury. *Parker* v. *The Woollen Company*, 2 Black, 545.

The charges of fraud and conspiracy in the bill are wholly unsupported by the proofs.

To let in the defence that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. *Wilson* v. *Anthony*, 19 Barber (Ark.), 16; *Taylor* v. *Adams*, 14 id. 62; *Johnson* v. *Johnson*, 5 Ala. 90; *Ferson* v. *Sanger*, 2 Ware, 256; *Fisher* v. *Boody*, 1 Curtis, 219; *Cholmondly* v. *Clinton*, 2 Jac. & Walk. 141; 2 Story's Eq., sect. 1520 *a*.

"A court of equity, which is never active in giving relief

against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith* v. *Clay*, Ambler, 645.

If the complainants had severally sought to enforce their claim in an action at law, *ex delicto* or *ex contractu*, the bar of the Statute of Limitations would have been complete after the lapse of six years. Rev. Stat. of 1857, p. 510.

This bill was filed on the 21st of February, 1871.

The complainants were supine and silent for more than seventeen years. In the mean time, the Kennebec and Portland company became hopelessly and finally insolvent, and its affairs a wreck. Proceedings were instituted to foreclose the second mortgage, and brought to a close. The company lost all its property, and has since existed only in name. A new corporation has come into existence, and acquired and owns all the property and effects lost by the old one. This transfer occurred more than seven years before the first step was taken in the present case. This long delay thus characterized is unaccounted for. The facts are amply sufficient to warrant the application of the rule of laches, and to give it the fullest effect.

Decree affirmed.

BOWEN v. CHASE.

1. A trust, created in order to give a married woman the separate and exclusive use of land, free from the control of her husband, will be sustained; by converting it into a legal estate, its purpose would be defeated, as, by virtue of his marital rights, the land would be placed under his control. *So held*, in regard to the effect of certain conveyances of land in New York, set out in the opinion of the court, which were executed in 1827 and 1828 to Michael Werckmeister by Stephen Jumel, upon certain trusts which limited a life-estate to the separate use of Eliza Brown Jumel, his wife, with a general power of appointment during her lifetime, and, on failure to make such appointment, to her heirs in fee-simple.

2. After the date of those conveyances, the said Eliza, by deed, bearing date Nov. 21, 1828, duly executed, as required by the trust, made an appointment of the land, in the following words, to wit: "Now I, the said Eliza Brown Jumel, do hereby direct, order, limit, and appoint that, immediately after my demise, the said Michael Werckmeister, or his heirs, convey all and singular the said above-described premises to such person or persons, and to such uses and purposes, as I, the said Eliza Brown Jumel, shall, by my last will and testament, under my hand, and executed in the presence of two or more witnesses, designate and appoint, and, for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon, during his said natural life, of six hundred dollars, payable to Mary Jumel Bownes, and, after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes and her heirs in fee." *Held*, that, after the termination of said Eliza's separate interest for life, the appointment limited the equitable estate in the land, and vested in said Stephen and Mary immediate interests, although they did not take effect in possession until the death of said Eliza, and were subject to be defeated by the exercise of her reserved power of disposing of the land by her last will and testament.

3. The effect of the chapter of the Revised Statutes of New York, touching uses and trusts (1 Rev. Stat. 727), which went into operation Jan. 1, 1830, upon the estates created by the trust and appointment, considered; but, in the view taken by the court of this case, it is not material whether they were, by the statute, turned into legal estates, or remained, as they were originally, merely equitable in their nature.

4. The appointment in favor of said Mary was a voluntary one; and as said Eliza had a power to lease and a power to convey, assure, and dispose, which latter power manifestly includes a power to sell, not only by the terms used, but, in this trust, by the direction as to the disposition of the purchase-money "in case of an absolute sale," sales of the land to actual purchasers for a valuable consideration were effectual, and superseded the prior appointment in favor of said Mary. It was not necessary to their validity that said Eliza, in making that appointment, should have expressly reserved a power of revocation.

5. Where the subsequent appointments were voluntary, or intended merely as means of restoring the property to its original trusts, or of revesting it absolutely in said Eliza, the interest of said Mary, whether it be regarded as a legal or an equitable estate, would not be thereby displaced.

6. Certain appointments, subsequent to that in favor of said Mary made by said Eliza, who survived her husband and died intestate in 1865, declared to be voluntary, and for the purpose of revesting the title in said Eliza. Bowen, claiming to be her sole heir-at-law, has brought sundry actions of ejectment to recover the land. Said Mary died intestate in 1848. The appellees are in possession of the land, and claim, as her heirs-at-law, under the appointment in her favor. *Held*, that they are entitled to relief in a court of equity. If their estate is to be regarded as still an equitable one, their right to such relief is undoubted, no matter where, or in whom, the legal estate may be. If, by virtue of the statute, their equitable estate was converted into a legal

estate, they have good cause to come into that court for the purpose of removing the cloud upon their title created by the subsequent voluntary appointments and conveyances.

7. That the evidence is merely voluminous or tedious is not sufficient cause for removing a case from a court of law to a court of equity.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated in the opinion of the court.

Argued by *Mr. M. E. Sawyer* and *Mr. L. S. Chatfield* for the appellant, and by *Mr. James C. Carter* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The principal objects of the bill in this case, which was filed in the court below by the appellees, Nelson Chase, Eliza Jumel Pery, and Paul R. G. Pery, her husband, and William I. Chase, were to establish their title to certain lands in the city of New York, known as the Stephen Jumel property, and to enjoin George W. Bowen, the appellant, from prosecuting certain actions of ejectment, one brought by him to recover the property above named, and the others to recover certain lands in Saratoga, belonging to the late Madame Jumel, widow of Stephen Jumel, and claimed by the appellees by way of satisfaction for certain charges against her estate, as well as by conveyance from her supposed heirs, children of a deceased sister.

Stephen Jumel was the owner of a lot at the corner of Broadway and Liberty Streets, and of several tracts of land on Harlem Heights, in the upper part of New York City. In 1827 and 1828, by certain mesne conveyances, the greater portion of this property was conveyed to one Michael Werckmeister upon the following trusts, namely: —

"In trust that the said party of the second part (Werckmeister) and his heirs collect and receive the rents, issues, and profits of the said above-described and hereby-conveyed premises, and every part and parcel thereof, and pay over the same unto Eliza Brown Jumel (the wife of Stephen Jumel, late of the city of New York, now of Paris, in France) or, at her election, suffer or permit her to use, occupy, and possess the said premises, and to have, take, collect, receive, and enjoy the rents and profits thereof, to and for her own separate use and benefit, and to and for such other uses and

purposes as the said Eliza Brown Jumel shall please and think fit, at her own free will and pleasure, and not subject to the control or interference of her present or any future husband, and the receipt and receipts of her, the said Eliza Brown Jumel, shall at all times be good and sufficient discharges for such payments, and for such rents and profits to him, the said party of the second part, his heirs, executors, and administrators, and to the person or persons who are or shall be liable to pay the same; and upon this further trust, that the said party of the second part or his heirs lease, demise, let, convey, assure, and dispose of all and singular the said above-described premises, with their and every of their appurtenances, to such person or persons, for such term or terms, on such rent or rents, for such price or prices, at such time or times, to such uses, intents, or purposes, and in such manner and form, as she, the said Eliza Brown Jumel, notwithstanding her present or any future coverture, as if she were a *feme sole*, shall, by any instrument in writing, executed in the presence of any two credible witnesses, order, direct, limit, or appoint; and in case of an absolute sale of said premises, or of any part thereof, to pay over the purchase-money to the said Eliza Brown Jumel, or invest the same as she shall order and direct; and upon this further trust, upon the decease of the said Eliza Brown Jumel, to convey the said above-described premises, or such parts thereof as shall not have been previously conveyed by the said party of the second part, or his heirs, and with respect to which no direction or appointment shall be made by the said Eliza Brown Jumel in her lifetime, to the heirs of said Eliza Brown Jumel in fee-simple; and pay over to the heirs of the said Eliza Brown Jumel such moneys as shall remain in the hands or under the control of the said party of the second part or his heirs, arising from collections of the rents and profits, or of the proceeds of the sales of the above-described premises, or any part thereof."

On the twenty-first day of November, 1828, the said Eliza Brown Jumel, by a deed duly executed as required by the trust, made an appointment of all the lands conveyed in trust, in the following terms, to wit: —

"Now I, the said Eliza Brown Jumel, do hereby direct, order, limit, and appoint, that, immediately after my demise, the said Michael Werckmeister, or his heirs, convey all and singular the said above-described premises to such person or persons, and to such uses and purposes, as I, the said Eliza Brown Jumel, shall by my last will and testament, under my hand, and executed in the pres-

ence of two or more witnesses, designate and appoint; and for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon during his said natural life, of six hundred dollars, payable to Mary Jumel Bownes, and after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes, and her heirs in fee."

It is on this trust and appointment that the appellees rely as the foundation of their title to what is generally known as the Stephen Jumel estate. Mary Jumel Bownes, the appointee of the residuary estate, was the adopted daughter or *protegée* of Stephen Jumel and Madame Jumel his wife, and the reputed niece of the latter. In 1832, Mary Jumel Bownes became the wife of Nelson Chase, and had by him two children, Eliza Jumel Pery and William I. Chase, appellees in this case. She died in 1843, leaving these children her sole heirs-at-law, in virtue of which they claim title to the estate.

The appellant claims to be an illegitimate son of Madame Jumel, born in 1794, before her marriage with Stephen Jumel; and by virtue of that relationship, and of a statute of New York, passed in 1855, enabling illegitimate children to inherit from their mother, he claims to be her sole heir-at-law. He resists, on various grounds, the claim of Mrs. Chase, and her heirs under the appointment. First, he contends that Madame Jumel took a legal estate in fee-simple by virtue of the trust-deed. But if not, then he contends, secondly, that by certain conveyances and appointments made by Madame Jumel, under the powers contained in the trust-deed, the appointment in favor of Mrs. Chase was displaced, and superseded by other estates which inured to Madame Jumel.

The conveyances and appointments referred to under the second head are the following: —

First, A conveyance to Alexander Hamilton by Werckmeister, the trustee, at the request and by the appointment of Madame Jumel, dated the tenth day of January, 1834, of ninety-four acres of land at Harlem Heights, for the expressed consideration of $15,000. On the twenty-first day of October, in the same year, this property was reconveyed by Hamilton to

the trustee, upon the same trusts declared in the original deed of trust.

Secondly, A conveyance by the trustee, at the instance and appointment of Madame Jumel, made on the twentieth day of August, 1842, to one Francis Phillippon, of a large portion of the estate, for the expressed consideration of $100,000; and a reconveyance of the same property, on the same day, by Phillippon to Madame Jumel in fee, for the expressed condition of one dollar.

Besides these conveyances, in 1850, a lot of thirty-nine acres, being part of the property on Harlem Heights, was sold and conveyed to Ambrose W. Kingsland; and, in 1858, another lot of three acres, to Isaac P. Martin: which conveyances are admitted to have been made to actual purchasers for valuable consideration.

The effect of these various deeds and conveyances is now to be considered. And, first, that of the trust-deeds executed to Werckmeister in 1827 and 1828. There were two of these deeds, but the trusts in both were precisely the same.

The limitations of this trust are very clear and plain, being of a life-estate to the separate use of Eliza Brown Jumel (known as Madame Jumel), with a general power of appointment during her lifetime; and, on failure to make such appointment, to her heirs in fee-simple.

The counsel for the appellant contends that this trust amounted to a use of the lands, and that, under the old statute of uses and trusts, it operated to vest the legal estate in fee in Madame Jumel. But we think that the authorities are very clear, that where a trust is thus created for the benefit of a married woman, for the purpose of giving her the separate use and control of lands free from the control of her husband, it will be sustained; since to merge the trust in the legal estate, or, to speak more properly, to convert it into a legal estate, would have the effect of placing the property in the husband's control by virtue of his marital rights, and would thus defeat the very purpose of the trust. *Harton* v. *Harton*, 7 T. R. 653; Cornish on Uses, 59, sect. 6; *Rife* v. *George*, 59 Penn. 393.

The legal effect of the appointment made by Madame Jumel, Nov. 21, 1828, we do not regard as any more doubtful

than that of the trust. It was manifestly this, that, subject to Madame Jumel's right of disposing of the lands by will (which right she reserved), and after the termination of her separate interest for life, the equitable estate in the lands was limited to her husband for life, with remainder to Mary Jumel Bownes in fee-simple. This is so obvious as to require no elaboration of argument or discussion. The interests limited to Stephen Jumel for life, and to Mary Jumel Bownes in fee, were immediate vested interests, though to take effect in possession at a subsequent period; namely, at the death of Madame Jumel, and subject to be devested by her reserved power of disposing of the lands by will. The circumstance that the appointment in their favor is, in form, a direction to the trustee to convey to them, does not derogate from the vesting quality of their equitable interests in the mean time. The conveyance would be necessary for the purpose of clothing them with the legal estate. *Stanley* v. *Stanley*, 16 Ves. 507; *Phipps* v. *Ackers*, 9 Cl. & Fin. 594; 4 Kent's Com. 204; *Radford* v. *Willis*, L. R. 12 Eq. Cas. 110; L. R. 7 Ch. App. 11.

The effect of the Revised Statutes of New York upon this trust is next to be considered. The chapter which contains the article on Uses and Trusts (1 Rev. Stat. 727) went into operation on the 1st of January, 1830. By this article all passive trusts were abolished, and the persons entitled to the actual possession of lands, and to the receipt of the rents and profits thereof, in law or in equity, were to be deemed to have the legal estate therein to the same extent as their equitable estate; saving, however, the estates of trustees whose title was not merely nominal, but was connected with some power of actual disposition or management in relation to the lands. Future trusts were allowed to be created to sell land for the benefit of creditors, or to create charges thereon, or to receive the rents and profits, and apply them to the use of any person for life or any shorter term. In construing these provisions, the courts of New York have held that a trust to receive and pay over rents and profits is valid; but that a trust for the use and benefit of the beneficiary, not requiring any action or management on the part of the trustee, except, perhaps, to make conveyances at the direction and appointment of the

beneficiary, is not a valid trust within the statute, but inures as a legal estate in the beneficiary. This, we think, is the general result of the cases. See *Leggett* v. *Perkins*, 3 Comst. 297; *Leggett* v. *Hunter*, 19 N. Y. 454; *Wood* v. *Mather*, 38 Barb. 477; *Anderson* v. *Mather*, 44 N. Y. 257; *Frazer* v. *Western*, 1 Barb. Ch. 238.

In applying the principle of these cases to the case before us, we are met by the alternative character of the trust, namely, that the trustee shall either collect and receive the rents and profits, and pay them over to Madame Jumel, or, at her election, shall permit her to use, occupy, and possess the premises, and collect and receive the rents and profits to her separate use; and, in either case, to convey as she might direct, or to her heirs in case no direction be given. The first of these alternatives, according to the cases, would be a valid trust; but the second is equivalent to nothing more than a mere trust for her use and benefit. During the life of her husband (who died in 1832), it might perhaps be fairly contended that the existence of the legal estate in the trustee was necessary to protect her in the enjoyment of the property as separate estate free from the control of her husband. But, after his death, the option of managing the property herself being in her, and not in the trustee, we are inclined to think that the trust became a mere passive one, and that the equitable estates were, by the Revised Statutes, converted into legal ones. This view is corroborated by the opinion of Chancellor Walworth, who had before him some questions concerning a portion of the estate in 1839, and who, in relation to Madame Jumel's interest, used this language: "Her equitable interest therein, as *cestui que trust*, being turned into a legal estate by the provisions of the Revised Statutes;" citing the section above referred to. *Jumel* v. *Jumel*, 7 Paige, 595. It is true, as said by the counsel for the appellees, that the point in question was not necessary to the decision in that case; but the observation shows the impressions of an eminent judge, when the very matter was before his mind, and we have not been referred to any New York decisions derogatory to this view of the case.

However, the view which we take of this case will not render it material whether the estates created by the trust and

appointment became legal estates, or remained, as they were originally, merely equitable in their nature.

The more material question is as to the effect of the conveyances made by Madame Jumel, and by the trustee in obedience to her direction and appointment subsequent to the death of her husband.

We may dismiss the notion which pervades the argument of the counsel for the appellees, that these conveyances were a fraud upon the appointment made in behalf of Mary Jumel Bownes (or Mrs. Chase). However proper that appointment may have been, considering the relations which the appointee sustained to Mr. Jumel and his wife, as their adopted daughter, it was, nevertheless, only a voluntary one; and the subsequent appointments can in no wise be regarded as frauds upon it. They were, or they were not, such appointments as Madame Jumel still had the power to make, and their effect is to be judged of by the nature of her power, and by that circumstance alone.

It is contended by the counsel for the appellant, that, where several distinct powers are given in the same instrument, the execution of one of these powers superior in dignity to others will supersede and override the latter, though executed first. This is, to a certain extent, true, as shown and explained by Mr. Sugden in his work on Powers, in the passages referred to. The execution, for example, of a power of sale will supersede all other powers, for it must necessarily do so in order to have any effect. Mr. Sugden, in illustrating the rule, says: —

"Thus a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser, for example, a lessee; for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether any particular use was really contained in the original settlement, or was introduced into it in the view of the law by the execution of a power contained in it." 2 Sugd. on Powers, 47, 48 (6th ed.).

In the present case there was a power to lease, and a power to convey, assure, and dispose That the latter power included

a power to "sell" is not only manifest from the words, but from a subsequent passage of the trust, which directs as to the disposition of the purchase-money "in case of an absolute sale." At the same time, the words are so general as to authorize a disposition in favor of a volunteer, or gratuitous beneficiary. Here, then, are really two distinct powers contained in one clause; and, according to the rules laid down by Mr. Sugden, the power to sell is the superior power, and will override the other power, and supersede it, if previously exercised.

This rule with regard to the relative priority and dignity of different powers in the same instrument, though depending on construction and the presumed intention of the donor, is some what analogous to the rule adopted by the courts in construing the act of 27 Elizabeth, respecting fraudulent conveyances. It has been invariably held under that act that a conveyance to a purchaser avoids all prior voluntary conveyances of the same lands; though, as between two voluntary conveyances, or two conveyances to purchasers, the first will take the precedency. Roberts on Fraud. Conv., pp. 33, 641. So, in regard to double powers, a power to sell or exchange, when exercised, overrides all other distinct powers; for they are necessarily exclusive of all others; whereas the uses appointed under other powers may possibly be served out of the estate procured by the price of the sale, or by the exchange. But when a mere power to convey, as distinguished from a power to sell, is once executed in favor of a voluntary beneficiary, it cannot be revoked without reserving a power of revocation, and will not, therefore, be superseded by a subsequent conveyance equally voluntary, made under the same power.

Had the transactions in question been real and effective sales to actual purchasers for valuable consideration, they would un doubtedly have superseded the voluntary appointment in favor of Mary Jumel Bownes. The position of the appellees' counsel, that no subsequent appointment could displace this without having expressly reserved a power of revocation, cannot be maintained, for, as we have seen, a sale does have that effect. There is no doubt, therefore, that the conveyances to Kingsland and Martin were valid and effectual. And the execution of those conveyances cannot be characterized as in any manner

fraudulent. They were conveyances which Madame Jumel, under her original power of appointment, had a right to make, notwithstanding the previous appointment in favor of her adopted daughter.

But the conveyances made to Hamilton and Phillippon were of a different character, and seem to have been intended merely as means of restoring the property to its original trusts, or of vesting it absolutely in Madame Jumel herself, freed from the said appointment. On this point there can be no dispute, so far as regards the deed to Phillippon. It was a mere formal conveyance, made to enable him to reconvey the property to Madame Jumel. As such it was simply voluntary, and could have no paramount effect over the previous appointment in favor of Mary Jumel Bownes.

The conveyance to Hamilton may admit of more doubt. But looking at the whole transaction, the conveyance and the reconveyance, we cannot avoid the conclusion that it was intended as a means of getting rid of the former appointment. The reconveyance by Hamilton to Wreckmeister was equivalent to a cancellation of the pretended purchase. It was not a sale made by Hamilton to Werckmeister, nor a settlement made by him for any purposes of his own. It was simply a handing back of the property. In our judgment, therefore, the two conveyances amounted to a mere formal transfer and retransfer; and, if any sale was ever intended, it was rescinded by the mutual consent of the parties to it. We are of opinion that this transaction did not, any more than that with Phillippon, affect the appointment in question, or the estate of the appointee, whether that estate is to be regarded as a legal or an equitable one.

The next question is as to the title of the appellees to equitable relief for protecting them in the title which they have thus acquired. Madame Jumel died in 1865; and the appellees immediately entered into full possession of all the property in question, both that which was derived from Stephen Jumel and that which is conceded to have been the proper estate of Madame Jumel; and they have been in possession ever since. The appellant, by his several actions of ejectment, seeks to deprive them of that possession. With regard to the Stephen Jumel property, the title to which we have been considering, and which

the appellees claim under and by virtue of the said trust and appointment, it is apparent that, if the estate which they thus acquired is to be regarded as still an equitable estate, their right to the protection of a court of equity is undoubted, no matter where, or in whom, the legal estate may be, — whether in the heirs of Werckmeister, the trustee, or in the heirs of Madame Jumel by virtue of the conveyances above referred to. On the other hand, if, by virtue of the Revised Statutes, the equitable estate of the appellees became converted into a legal estate, they would still have good cause to come into a court of equity for the purpose of removing the cloud upon their title created by the subsequent appointments and conveyances to Hamilton and Phillippon. These instruments on their face purport to be conveyances to purchasers, setting forth pecuniary considerations to a large amount, and, by themselves, would import such a disposition of the lands conveyed as would defeat the appointment made in favor of Mrs. Chase. It is only by bringing them into juxtaposition with the sequent transactions in each case respectively, — that is to say, by the introduction of supplemental evidence, — that they are shown to be ineffective. In view of these considerations, and of the fact that the whole title involves the true construction of the trust and the power of appointment, and the further fact that Madame Jumel was in full possession of the property, using and treating it as her own absolute estate until her death, the appellees were perfectly justified in coming into a court of equity to have these conveyances declared void and without effect.

To this extent we think they are entitled to a decree, including also a decree for a perpetual injunction against the appellant, prohibiting him from prosecuting any action or suit for the recovery of the lands embraced in the appointment made in favor of Mary Jumel Bownes, by the deed of appointment executed by Eliza B. Jumel, and bearing date the twenty-first day of November, 1828.

As to the residue of the relief prayed for, — namely, that the appellees should have the lands and real estate of which Madame Jumel indisputably died seised in fee-simple appropriated to them in satisfaction of the supposed frauds committed by her against the trust, and of the engagements which she is

supposed to have made to settle her estate, or a portion thereof, upon Eliza Jumel Chase, in consideration of her marriage with Mr. Pery, — we are unable to perceive any valid ground for granting the prayer of the bill. If there were no other objections to the decree sought in this behalf, we cannot agree with the counsel of the appellees, that any such fraud as is supposed was practised, or, if attempted, that the attempt was successful; and we fail to see any thing in the proofs adduced with regard to the negotiations of the said marriage sufficient to sustain such a decree.

Nor do we think that the nature of the litigation created by the actions of ejectment, the character and amount of the evidence, or the number of suits, is such as to lay the foundation for the assumption of the entire controversy by a court of equity. Supposing the relationship of the appellant to Madame Jumel to be such as he pretends it is, there does not seem to be any unnecessary multiplication of actions. All the property in the city of New York is included in one suit, and the actions in Saratoga are brought against the several tenants in possession. The power of the courts of law to consolidate actions depending between the same parties, and upon the same questions in controversy, is probably sufficient to prevent any practical inconvenience not inherent in the case itself. If the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for removing a case from a court of law to a court of equity.

The claim made by the appellees to recover from the appellant the sum of $2,500, procured by him by way of compromise from a grantee of Mr. Chase, is, in our opinion, utterly groundless.

Decree reversed, and cause remanded with directions to enter a decree in conformity with this opinion.

INDEX.

ABANDONMENT. See *Letters-Patent*, 1.

ACCOUNT. See *Letters-Patent*, 14, 16.

ADMIRALTY.

1. A steam-tug which engages to tow a vessel into a port, although not a common carrier nor an insurer, is bound to exercise reasonable skill and care in every thing relating to the work until it is accomplished, and she is liable for the want of either to the extent of the damage sustained. *The "Margaret,"* 494.
2. She is bound to know the channel of her home port, how to reach it, and whether, in the state of the wind and water, it is safe and proper to attempt to enter with a tow. *Id.*
3. Under the maritime law, there is no lien upon a vessel for materials furnished and work done in repairing her at her home port. *The "Edith,"* 518.
4. A creditor, claiming the benefit of the provisions of the statute of New York, passed April 24, 1862, which purport to give such a lien, must, whether they be invalid or not, — a point which the court deems it unnecessary in this case to decide, — take it subject to all the conditions which they impose; and he loses it if it be not enforced within the time prescribed. Where a seizure has been seasonably made, a bond in conformity to them, when executed and delivered to him by the owner, is a substitute for the lien, and works a discharge of the vessel. *Id.*
5. The District Court can marshal the fund in its registry only between lien-holders and owners. *Id.*
6. This court, concurring in opinion with the court below that in this case both vessels were at fault, affirms the decree dividing the damages between them. *The "Stephen Morgan,"* 599.

ALABAMA. See *Mortgage*, 6.

APPEAL. See *Court of Claims*, 2, 3; *Mandamus*, 1, 2; *Practice*, 8, 9, 14, 17, 29.

1. An appeal does not lie from an order of the court below, denying a motion in a pending suit, to permit a person to intervene and become a party thereto. *Ex parte Cutting*, 14.

APPEAL (*continued*).

2. Subsequently to a decree *pro confesso*, additional parties were, by leave of the court, permitted to intervene as defendants, in the same manner and with like effect as if named in the original and supplemental bills. The case was then referred to a master, who computed, ascertained, and reported the amount of indebtedness, &c.; whereupon the court, after finding certain facts and overruling the exceptions of such intervening parties to his report, passed a final decree, but denied their right to an appeal therefrom. *Held*, 1. That they had that right. 2. That, to enforce it, a *mandamus* lies from this court. *Ex parte Jordan*, 248.

3. Appeals do not lie to this court from the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt laws. *Coure* v. *Crane*, 441.

4. Where, in the progress of a suit for the foreclosure of a mortgage, a receiver was appointed, against whom, after the foreclosure and sale of the mortgaged premises, a decree was rendered directing him to pay into court $18,776.25, the balance found due from him on the settlement of his accounts, — *Held*, that he had the right to appeal from that decree. *Hinckley* v. *Gilman, Clinton, & Springfield Railroad Co.* 467.

5. Whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. The subsequent appeal brings up only the proceedings of the Circuit Court after the mandate of this court. *Supervisors* v. *Kennicott*, 498.

APPOINTMENT, POWER OF. See *Trusts*.

ARMY REGULATIONS. See *Military Stations*, 2; *Officers of the Army*, 1, 2.

ASSIGNEE IN BANKRUPTCY. See *Mortgage*, 5.

A decree in a suit between husband and wife, confirming a conveyance of real estate made to her by him, does not bind his assignee in bankruptcy suing to set such conveyance aside on the ground that it was made in fraud of creditors. *Humes* v. *Scruggs*, 22.

ATTACHMENT.

An attachment levied upon lands in Arkansas is not discharged by the debtor's appearance to the suit. *Pike* v. *Wassell*, 711.

ATTORNEY AND CLIENT. See *Evidence*, 1.

AUTHENTICATION OF THE PUBLIC ACTS, ETC., OF A STATE.

The act of Congress, prescribing the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, so as to take effect in every other State, does not relate to the admissibility of such acts, &c., of a State in its own courts, or in the courts of the United States sitting in that State. *Town of South Ottawa* v. *Perkins*, 260.

BANK OR BANKER. See *Taxation*, 2.

BANKRUPTCY. See *Appeal*, 8; *Jurisdiction*, 2, 8.

1. If money, which a married woman might have had secured to her own use, is allowed to go into the business of her husband, be mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife upon the occurrence of his bankruptcy is a fraud upon his creditors, and void. *Humes* v. *Scruggs*, 22.
2. A provision in the constitution of a stock and exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, — the purchaser not becoming a member, nor having the right to transact business in the board until he shall be elected by ballot, — is neither contrary to public policy, nor in violation of the Bankrupt Act. *Hyde* v. *Woods*, 523.
3. Membership of the board is not a matter of absolute sale. Although property, it is, when purchased, qualified and incumbered by conditions which the creators of it had the right to impose, and a compliance with which is necessary to obtain it. *Id.*
4. In computing the four months before filing the petition in bankruptcy, within which time the assignment of his property by an insolvent debtor, with a view to give a preference to any creditor, is void, the day upon which the petition is filed must be excluded. *Dutcher* v. *Wright*, 553.
5. *Toof et al.* v. *Martin*, 13 Wall. 40, and *Buchanan* v. *Smith*, 16 id. 277, cited, and the doctrines therein announced applied to the facts of this case. *Id.*
6. The subsequent bankruptcy of the pledgor of a negotiable instrument does not deprive the pledgees of their right to dispose of it upon his default. *Jerome* v. *McCarter*, 734.

BEDS AND SHORES OF NAVIGABLE STREAMS, TITLE TO. See *Commerce*, 3–7; *Riparian Proprietors*, 1–3.

BILL OF EXCEPTIONS. See *Practice*, 3, 23.

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Negotiable Instruments*.

BONA FIDE PURCHASERS FOR VALUE. See *Municipal Bonds*, 2, 4, 5, 6, 10.

BONDS. See *Mortgage*, 2, 3, 7; *Municipal Bonds*.

BURDEN OF PROOF. See *Distilled Spirits*, 1; *Pleading*, 1; *Practice*, 20.

CENTENNIAL BOARD OF FINANCE.

In the distribution of the moneys remaining in the treasury of the Centennial Board of Finance at the close of that corporation, as provided for in sect. 10 of the act of Congress of June 1, 1872 (17 Stat. 203), the appropriation of $1,500,000, made by the act of Feb. 16, 1876 (19 id. 3), must be paid into the treasury of the United States before any division of assets is made among the stockholders in satisfaction and discharge of the capital stock. *Eyster* v. *Centennial Board of Finance*, 500.

CERTIORARI. See *Practice*, 16.

CHARGE TO JURY.

Where a policy of life insurance makes the declaration, the questions set forth in the proposal and the answers to them, a part of the contract, and declares, that, if they are found in any respect to be false and fraudulent, it shall be void, the court below did not err in charging the jury, that, where the answers were qualified by the statement of the applicant that they were as nearly correct as he could remember, the right to recover would not be defeated, unless the jury were satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness. *Ætna Life Insurance Co.* v. *France*, 561.

CHATTELS, DEED OF TRUST OF. See *Landlord and Tenant*, 6; *Mortgage*, 1.

CHECK. See *Negotiable Instruments*, 4, 5, 6.

CHESAPEAKE AND OHIO CANAL COMPANY, PROPERTY OF, IN THE DISTRICT OF COLUMBIA. See *Taxation*.

CHORPENNING CLAIM.

From the repeal of the joint resolution of April 15, 1870 (16 Stat. 678), authorizing the Postmaster-General to adjust the accounts of George Chorpenning, and from the prohibition in the act of March 3, 1871 (id. 519), directing that no part of the money thereby appropriated for the use of the Post-office Department shall "be applied to the payment of what is known as the Chorpenning claim," the implication is clear, that nothing more was to be paid to him on account of said claim, without further authority from Congress. *Chorpenning* v. *United States*, 397.

CITATION, NON-SERVICE OF. See *Practice*, 9.

CITIZENSHIP, PRIVILEGES AND IMMUNITIES OF. See *Constitutional Law*, 10–12.

CLERK, PAYMENT OF HIS FEES. See *Practice*, 14.

COMMERCE. See *Fisheries; Warehouses.*

1. So much of the act of the legislature of New York, passed May 22, 1862, amended April 17, 1865, as requires, with certain exceptions, all ships or vessels which enter the port of New York, or load or unload, or make fast to any wharf therein, to pay a certain percentage per ton, to be computed on the tonnage expressed in the registers of enrolments of such ships or vessels respectively, is in violation of the Constitution of the United States, and therefore void. *Inman Steamship Co.* v. *Tinker*, 238.
2. The act of the legislature of Louisiana, approved March 6, 1869, in relation to the survey of the hatches of every sea-going vessel arriving at New Orleans, and of the damaged goods coming on board of her, &c., being a regulation of commerce with foreign nations and among the several States, is in violation of the Constitution of the United States, and therefore void. *Foster* v. *Master and Port Wardens of the Port of New Orleans*, 246.
3. In order that the passage-ways of commerce and navigation might be subject to public authority and control, the title to the land under water and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by the common law, vested in the sovereign for the public use and benefit. *Barney* v. *Keokuk*, 324.
4. In England, tide-waters only were regarded as navigable. Hence the rule as to property was often expressed as applicable to them only, although the reason of it would make it apply to all navigable waters. *Id.*
5. The form, instead of the substance, of the rule has been adopted in many of the States of this country; and in them the public title to the beds and shores of navigable streams is confined to tide-water. *Id.*
6. From the same cause, the admiralty jurisdiction of the United States was for a long period restricted to tide-water. *Id.*
7. Since the decision of this court in *The Genesee Chief*, in 1851 (12 How. 443), declaring all the great lakes and rivers of the country navigable that are really such, there is no longer any reason for thus restricting the title of the State, except as a change in that respect might interfere with vested rights and established rules of property. *Id.*

COMMON CARRIER.

1. A railroad company in Wisconsin cannot recover for the transportation of property more than the maximum fixed by the act of that State of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered. *Chicago, Milwaukee, & St. Paul Railway Co.* v. *Ackley*, 179.
2. The Winona and St. Peter Railroad Company, having been incorporated as a common carrier, with all the rights and subject to all the obligations which that term implies, was bound to carry, when called

COMMON CARRIER (*continued*).
upon for that purpose, and charge only a reasonable compensation therefor. *Winona & St. Peter Railroad Co.* v. *Blake*, 180.
8. An express company, well knowing that certain goods, received by it for transportation to a place mentioned in its receipt, were the property of the shipper, delivered them, without his knowledge, to a third person, at the place of shipment, on the order of the consignee. *Held*, that the company was liable to the shipper for the value of the goods. *Southern Express Co.* v. *Dickson*, 549.

COMMON LAW.
The common law, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. *Munn* v. *Illinois*, 113.

COMMUTATION FOR QUARTERS AND FUEL. See *Military Stations*, 2.

COMPTROLLER OF THE CURRENCY. See *National Banks*, 3, 5–9.

CONDEMNATION. See *Distilled Spirits*, 1, 2.

CONDITION PRECEDENT. See *Municipal Bonds*, 3–6, 16, 20, 28.

CONFEDERATE TREASURY NOTES. See *Negotiable Instruments*, 10, 11, 12.

CONFISCATION.
Certain lands in Arkansas, liable to confiscation under the act of July 17, 1862 (12 Stat. 589), and belonging to A., a non-resident of the State, were seized Feb. 16, 1865, by the marshal, pursuant to instructions from the district attorney, who, on the 17th of that month, filed a libel of information against them in the proper District Court of the United States. On the following day, a warrant of arrest and monition was issued and duly served. The libel was amended April 5, so as to embrace other lands of A. On that day a decree of condemnation, forfeiture, and sale of all the lands was entered by that court, and they were sold on the 28th of that month by the marshal, under a *venditioni exponas*. The purchasers subsequently conveyed them to B. The decree of condemnation was affirmed by the Circuit Court. A writ of attachment, sued out of one of the courts of Arkansas, March 9, 1865, at the suit of sundry creditors of A, was on that day levied upon the same lands. A., by his attorney, entered his appearance to the suit, and judgment was rendered against him Sept. 29. All of said lands were sold by the sheriff under a *fieri facias*. B. became the purchaser, and refuses to pay taxes upon them, in order that, by buying them at a sale for delinquent taxes, his title may be perfected. A. is still living, and his children brought this suit. *Held*, 1. That the appearance of A. did not discharge the lien of the attachment. 2. That the levy of that

CONFISCATION (*continued*).

writ by the sheriff upon the lands seized by the marshal was void, and that B.'s interest in them is determinable upon the death of A. 3. That the decree of condemnation did not divest the rights of the attaching creditors in the lands not seized by the marshal, and that B.'s title to them in fee, acquired by his purchase at the sheriff's sale, was not affected by the proceedings in confiscation, and the sale under them. 4. That the affirmance by the Circuit Court of the decree gave no validity to it as against the attaching creditors. 5. That the heirs apparent or presumptive of A. have, in regard to the lands so seized and sold by the marshal, a right to protect their estate from forfeiture or incumbrance, and that B.'s refusal to pay the taxes on them presents a proper case for relief in a court of equity. *Pike* v. *Wassell*, 711.

CONSIGNOR AND CONSIGNEE. See *Common Carrier*, 3.

CONSTITUTIONAL LAW. See *Commerce*, 1, 2; *Corporations*, 2; *Fisheries; Judicial Comity*, 1–5; *National Banks*, 4.

1. Down to the time of the adoption of the fourteenth amendment of the Constitution of the United States, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such deprivation. *Munn* v. *Illinois*, 113.
2. The court does not hold that a case may not arise in which it may be found that a State has, under the form of regulating her own affairs, encroached upon the exclusive domain of Congress in respect to inter-state commerce. *Id.*
3. The ninth section of the first article of the Constitution of the United States operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs. *Id.*
4. The act of the general assembly of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State," approved April 25, 1871, is not repugnant to the Constitution of the United States. *Id.*
5. The act of the general assembly of the State of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this State," approved March 23, 1874, is not in conflict with sect. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens,

CONSTITUTIONAL LAW (*continued*).
privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" nor is it a regulation of inter-state commerce. *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 155.

6. The Chicago and North-western Railway Company was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The Constitution of Wisconsin, in force when the charters were granted, provides that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." *Held*, that the legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the State, or taken up outside the State and brought within it, or taken up inside and carried without. *Peik* v. *Chicago & North-Western Railway Co.*, 164.

7. The act of Wisconsin, approved March 11, 1874, entitled "An Act relating to railroads, express and telegraph companies, in the State of Wisconsin," is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress shall act in reference to the relations of this consolidated company to inter-state commerce, the regulation of its fares, &c., so far as they are of domestic concern, is within the power of that State. *Id.*

8. Neither the act of the legislature of Minnesota of Feb. 28, 1866, nor the Constitution of the State, adds to or takes from the grant made to the Winona and St. Peter Railroad Company by its original charter. *Winona & St. Peter Railroad Co.* v. *Blake*, 180.

9. The several States of the Union possess the power to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners. *United States* v. *Fox*, 315.

10. The right which the citizens of a State acquire by her appropriation to their use of the beds of all tide-waters within her jurisdiction as a common for taking and cultivating fish is a property right, and not a mere privilege or immunity of citizenship. *McCready* v. *Virginia*, 391.

11. The second section of the fourth article of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," does not vest the citizens of one State with any interest in the common property of the citizens of another State. *Id.*

12. A law of Virginia, by which only such persons as are not citizens of

CONSTITUTIONAL LAW (*continued*).
that State are prohibited from planting oysters in the soil covered by her tide-waters, is neither a regulation of commerce nor a violation of any privilege or immunity of inter-state citizenship. *Id.*

13. The court reaffirms the decision in *Insurance Company* v. *Morse*, 20 Wall. 445, that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of Wisconsin, requiring such an agreement, is in conflict with the Constitution of the United States. *Doyle* v. *Continental Insurance Co.*, 535.

14. A State has the right to impose conditions, not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another State, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause. *Id.*

15. The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the State courts to the Federal courts, the secretary of State should revoke and cancel its license to do business within the State. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the Federal courts, is not accurate. The effect of this decision is, that the company must forego such resort, or cease its business in the State. The latter result is here accomplished. *Id.*

16. As the State has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry. *Id.*

CONTRACTS. See *Court of Claims*, 1, 4; *Eight-Hour Law*; *Insurance*, 1–4.

1. The telegraphic correspondence in this case, in relation to the sale and purchase of certain bonds, considered, and held to constitute a complete contract of sale upon the condition, or with an implied warranty, that the bonds were genuine. *Utley* v. *Donaldson*, 29.

2. The contract was not so modified by subsequent correspondence as to amount to a waiver on the part of the purchaser of such condition or warranty. *Id.*

3. In this case, no formal lease of the property was executed; but the court holds that the correspondence under which the United States entered into occupancy constituted a contract of letting for one year, with a privilege of three, at a rent of $500 per month, without restriction as to the use to which the property might be put. *United States* v. *Bostwick*, 53.

4. Where a contract, entered into by a city for the construction of certain public works, provides that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action,

CONTRACTS (*continued*).

in finally accepting them, is an announcement of his decision that the terms of the contract have been complied with, and is binding upon the city. *Omaha* v. *Hammond*, 98.

5. The power of a court of equity to cancel an executed contract ought not to be exercised, unless the fraud and false representations set up as the ground for relief are clearly proved, and the complainant has been thereby deceived and injured. *Atlantic Delaine Co.* v. *James*, 207.

CONVEYANCES. See *Equity*, 2–4; *Trusts*.

CONVEYANCES IN FRAUD OF THE BANKRUPT ACT. See *Assignee in Bankruptcy; Bankruptcy*, 1, 4, 5.

CORPORATIONS. See *Railroad Companies, Legislative Control of their Rates of Fare and Freight*, 1–3; *Taxation*, 2–4.

1. Where a railroad company has been a corporation *de facto* from the date of its organization, its existence and its ability to contract cannot be called in question in a suit brought upon evidences of debt given to it. *Commissioners of Douglas County* v. *Bolles*, 104.
2. Certain Wisconsin railroad corporations were consolidated with others of Illinois on terms which, in effect, required that the consolidated company should, when operating in Wisconsin, be subject to its laws. *Held*, that Wisconsin can legislate for the company in that State precisely as it could have legislated for its own original companies, if no consolidation had taken place. *Peik* v. *Chicago & North-Western Railway Co.*, 164.
3. A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each State, is, nevertheless, in Iowa, a corporation existing there under the laws of that State alone. *Muller* v. *Dows*, 444.

COUPONS. See *Estoppel*, 2, 3, 12, 13; *Mortgage*, 2, 3; *Municipal Bonds*, 18, 27.

COURT OF CLAIMS. See *Practice*, 11–13, 15–17.

1. The obligations of the United States to its lessor relate to the condition of the premises at the time the term commenced. For damages done before that time by the army engaged in the suppression of the rebellion, no action can be maintained in the Court of Claims. *United States* v. *Bostwick*, 53.
2. The act of May 9, 1866 (14 Stat. 44), extending the jurisdiction of the Court of Claims, does not dispense with the existing rules regulating appeals from that court. *United States* v. *Clark*, 78.
3. In cases to which that act applies, the Court of Claims should set forth in its finding of facts the amount of loss, if any, which the petitioner has sustained. *Id.*
4. By reason of its improper suspension of the work of a contractor, who

COURT OF CLAIMS (*continued*).
had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use, the United States is liable in the Court of Claims for such damages as he has actually sustained. *United States* v. *Smith*, 214.

CREDITORS. See *Assignee in Bankruptcy; Bankruptcy*, 1, 2, 4, 5; *Husband and Wife*.

CRIMINAL CASES. See *Practice*, 5.

CROSS-EXAMINATION. See *Practice*, 4.

DAMAGES. See *Admiralty*, 4; *Court of Claims*, 1, 4; *Letters-Patent*, 15, 16, 19, 20; *Practice*, 6, 7, 12, 18.

DECREE. See *Estoppel* 7; *Jurisdiction*, 5; *Practice*, 24.

DEED. See *Prescription*, 3; *Sale for Taxes*.
The delivery of a deed conveying land will, in the absence of direct evidence of the fact, be presumed from the concurrent acts of the parties recognizing a transfer of the title. Thus, where a deed had been executed and recorded without the knowledge of the grantee, who subsequently, upon request of the grantor, conveyed the land to a third party, it was *held* that this recognition by both parties of the transfer of the title was sufficient evidence that at that time the deed had been delivered. *Gould* v. *Day*, 405.

DEVASTAVIT. See *Executors and Administrators*, 3.

DEVISE.
By a statute of New York, a devise of lands in that State can only be made to natural persons and to such corporations as are created under the laws of the State and are authorized to take by devise. A devise, therefore, of lands in that State to the government of the United States is void. *United States* v. *Fox*, 315.

DISTILLED SPIRITS.
The forty-fifth section of the act of July 13, 1866 (14 Stat. 168), imposes upon a claimant of distilled spirits, seized for a violation of that section, the burden of proving that the requirements of law have been complied with, and this court, upon consideration of the evidence disclosed in the record, deems it insufficient, and affirms the decree of condemnation. *One Hundred and Ninety-nine Barrels of Whiskey* v. *United States*, 86.

DISTRICT OF COLUMBIA. See *Ejectment; Husband and Wife*.

DRAFT. See *Negotiable Instruments*, 13, 14.

DRAWER AND DRAWEE. See *Negotiable Instruments*, 4–6.

DUE PROCESS OF LAW. See *Constitutional Law*, 1; *Rights of Property, and to a Compensation for its Use*.

EIGHT-HOUR LAW. See *Estoppel*, 4.

1. The act of Congress of June 25, 1868 (15 Stat. 77), declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the government of the United States, is in the nature of a direction by the government to its agents. *United States* v. *Martin*, 400.
2. It is not a contract between the government and its laborers, that eight hours shall constitute a day's work. It neither prevents the government from making agreements with them, by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours' labor. *Id.*
3. Where, therefore, a laborer, in the habit of working for the government twelve hours a day, for $2.50 a day, is informed by the proper authority that, if he remains in the service at that compensation, he must continue to work twelve hours a day, and he does so continue, and is paid accordingly, he cannot afterwards recover for the additional time over eight hours as a day's labor. *Id.*

EJECTMENT.

1. The act of Congress approved June 1, 1870 (16 Stat. 146), abolishing all fictions in ejectment within the District of Columbia, does not abolish that action, nor convert it into a writ of right. *Hogan* v. *Kurtz*, 773.
2. Uninterrupted, open, visible, exclusive, and notorious adverse possession by the defendant, under a claim of title for twenty years, is a good defence, unless the other party is within some one of the exceptions contained in the Statute of Limitations; and proof of such possession is admissible under the general issue. *Id.*
3. The Statute of Limitations, when it begins to run, will not be arrested by any subsequent disability; and a party, claiming the benefit of its exceptions, can only avail himself of the disability which existed when the right of action first accrued. *Id.*
4. This action of ejectment was brought more than three years after the passage of the act of March 3, 1865, the second section whereof (13 Stat. 532) abrogated all exceptions in favor of parties beyond the District of Columbia, which, under then existing laws, might be replied or relied on in any action or proceeding brought in said District, with a saving as to actions then pending, or which might be brought within three years thereafter. The exception of those laws in favor of such of the grantors of the plaintiff as were foreigners and lived beyond seas was no longer in force. *Id.*

EQUITY. See *Contracts*, 5; *Power of Attorney*, 1; *Practice*, 28; *Trusts*, 2–6.

1. Before the laws of the United States were extended over the Territory of Oregon, the settlers in that country had formed for themselves a provisional government, under which they adopted regulations

EQUITY (*continued*).

for the possession and occupation of land in the Territory among themselves, although the title to the land was in the United States. Under the regulations, land was occupied, cultivated, and improved, and bought and sold, as if the parties had possessed the fee. The claimants did not, in their dealings with the land, deny the proprietorship of the United States, but they acted upon the expectation that their possessions and improvements would be respected by the government, and that ultimately they should acquire the title; and it was the general understanding of the people, that, whenever the legal title was obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States. This understanding affected all transactions in land until the passage of the Donation Act of Sept. 27, 1850. *Held*, that a purchaser under these circumstances from the claimant, or a person whose purchase from another had been confirmed by the claimant, acquired as against him an equitable right to the land which a court of equity will enforce when he has obtained the patent of the United States; and this equitable right passes to subsequent grantees of the first purchaser or confirmee. *Stark* v. *Starr*, 477.

2. Whenever there is great weakness of mind, though not amounting to absolute disqualification, arising from age, sickness, or any other cause, in a person executing a conveyance, and the consideration given for the land is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. *Allore* v. *Jewell*, 506.

3. When a person, from infirmity and mental weakness, is likely to be easily influenced by others, transactions entered into by such person without independent advice will be set aside, if there is any unfairness in them. The principle upon which courts act in such cases, applied to a conveyance of land obtained from a woman advanced in years, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. *Id.*

4. The lapse of time, six years, before bringing suit to cancel a conveyance so obtained, cannot avail the defendant where he has had possession of the land, and a reasonable rent therefor is equal to the value of his improvements thereon, and there has been no loss of evidence preventing a full presentation of the case. *Id.*

5 A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana Territory, and to enforce a mechanic's and laborer's lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and the sale

EQUITY (*continued*).

of mortgaged premises. The fact that, according to the modes of procedure adopted in the Territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law. *Davis* v. *Alvord*, 545.

6. The court affirms the doctrine announced in *Hendrickson* v. *Hinckley*, 17 How. 443, that a court of equity will not enjoin a judgment at law, unless the proof clearly shows that the defendant had a just defence, of which he could not avail himself at law, or to which, if available, he was prevented from resorting, by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents. *Crim* v. *Handley*, 652.

7. Absence of one of the counsel employed to conduct his defence in a suit at law does not furnish ground for equitable relief, where it appears that the defendant, had he been present at the trial, might have employed other counsel equally competent; nor does the fact that a witness upon whom he relied was so sick during his examination as to impair his recollection of facts within his knowledge. Having failed to ask a postponement or a continuance, he cannot go into equity and claim to have the judgment enjoined. *Id.*

8. Nor will such relief be granted because the record of a prior suit upon which the defendant relied was lost, or could not be found by the clerk of the court. The loss of the record, and an unsuccessful search for it, presented a good cause for a continuance. Proof of its contents was also available under such circumstances as secondary evidence. *Id.*

9. That the evidence is merely voluminous or tedious, is not sufficient cause for removing a case from a court of law to a court of equity. *Bowen* v. *Chase*, 812.

10. A railroad company, on the 30th of April, 1850, mortgaged to trustees a specifically described portion of its road to secure certain certificates of indebtedness bearing interest at the rate of ten per cent per annum. Subsequent mortgages covering the entire line of road were made. As the work progressed, the company issued certificates of preferred stock, on which dividends of ten per cent per annum were to be paid. In October, 1852, the company made a proposition to waive, until Nov. 1, 1870, its right to redeem at pleasure the portion of its road first mortgaged, provided the holders of the certificates of indebtedness would, by indorsement thereon, authorize the trustees, after paying the holders three per cent semiannually on the said certificates, to pay over semiannually to the treasurer of the company, for its use and benefit, the balance of the

EQUITY (*continued*).

income (for interest) which the stockholders were then entitled to receive, viz., two per cent, to be held by him, and appropriated, as far as might be required, or as the same might go, to the payment of interest to such preferred stockholders as should surrender their old certificates and receive new certificates of preferred stock, bearing three per cent interest or income semiannually in lieu of five per cent, as then stipulated. The company authorized the president to issue such new certificates of preferred stock, and to waive the right to redeem. None of the holders of the preferred stock accepted the proposition until Sept. 1, 1858. The trustees of the second mortgage foreclosed; the bondholders formed a new corporation, and have operated and owned the road since November, 1862. The holders of the new certificates of preferred stock filed their bill, Feb. 21, 1871, to recover the four per cent per annum relinquished under the first mortgage. On final hearing, the bill was dismissed. *Held*, 1. That there is no privity between the complainants and the new corporation. 2. That there was no privity between the holders of the certificates under the first mortgage and the preferred stockholders. 3. That the defence of the Statute of Limitations not having been set up by plea or answer, the case in that aspect cannot be considered. 4. That as the complainants, if they could recover the moneys claimed, would be entitled to discovery and an account, the objection that they have a remedy at law is not available. Where such an objection lies, it is the duty of the court *sua sponte* to take notice of it, and give it effect. 5. That it is not necessary, in order to let in a defence that the claim is stale, that a foundation should be laid by any averment in the answer. Where the facts disclose laches and neglect on the part of the complainant, the court will refuse relief. *Sullivan* v. *Portland & Kennebec Railroad Co.*, 806.

EQUITY OF REDEMPTION. See *Mortgage*, 4.

ESTOPPEL. See *Contracts*, 4, 7; *Corporations*, 1; *Letters-Patent*, 12; *Municipal Bonds*, 12; *National Banks*, 5, 7, 8; *Pleading*, 1, 2; *Power of Attorney*, 2; *Practice*, 86.

1. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that pur-

ESTOPPEL (*continued*).

pose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Cromwell* v. *County of Sac*, 351.

2. In an action against a county in Iowa upon certain interest coupons originally attached to bonds issued by the county for the erection of a court-house, it was found and determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value; and, inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover. *Held*, that the judgment did not estop the plaintiff, holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing, in a second action against the county, that he acquired such other bonds and coupons for value before maturity. *Id.*

3. The finding in one action that the plaintiff therein is the holder and owner of certain coupons in suit does not estop the defendant from showing, in another action, that such plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. The finding only establishes the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another. *Id.*

4. An allowance by the government, upon the application of the laborer, of a sum for the excess of time over eight hours per day, is, when accepted by him in full of the account, a bar to any further claim. *United States* v. *Martin*, 400.

5. The omission of indorsers on a series of notes, transferred to the holder in settlement of their own note held by him, upon an agreement in writing that they should not be held liable on their indorsement, to set up the agreement as a defence to an action against them, brought by the holder on two of the notes, does not preclude them from setting up the agreement in a second action by the holder on others of the same series of notes. The judgment in the original action does not operate as an estoppel against showing the existence and validity of the agreement in the second action. *Davis* v. *Brown*, 423.

6. When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. *Id.*

7. The complainant, Starr, and his brother, being in possession of cer-

ESTOPPEL (*continued*).

tain lots in the city of Portland, Oregon, filed a bill in equity in the State court to quiet their title and compel the defendant, who claimed an adverse interest under his patent from the United States, to execute a release to them. Their bill set forth two distinct and independent causes of action, or grounds for relief: one, founded upon an agreement made by the defendant with the parties through whom the complainants claimed, to ratify and confirm the title of such parties; and the other, founded upon a patent of the United States, issued to the city of Portland for land within its limits, in trust for the several use and benefit of the occupants thereof. This patent embraced the premises in controversy, and the complainants claimed as beneficiaries under it. On motion of the defendant, the court held that the two grounds for equitable relief were inconsistent, and compelled the complainants to elect upon which ground they would proceed. They objected to the order, but, under its compulsion, elected to proceed under the city patent, and accordingly amended their bill so as to present their claim for relief solely as beneficiaries under that instrument. The State court held that the patent to Stark was void as against the complainants, and decreed in their favor. On appeal to the Supreme Court of the United States, the decree was reversed, that court holding that the patent to the city was void; and the bill was subsequently dismissed. The defendant having afterwards commenced an action of ejectment for the possession of the premises, and recovered judgment, the complainant, who had in the mean time acquired the interest of his brother, filed the present bill, setting up substantially the same matter respecting the agreement of Stark with the parties through whom he claimed which was originally averred in the first suit, and also that the defendant was estopped by his acts from asserting title to the premises. *Held*, that the proceedings and decree in the first suit did not conclude the complainant in the present suit upon the agreement. *Stark* v. *Starr*, 477.

8. Where it is not a condition of a policy of life insurance that a statement of the age of the insured should accompany the proofs of his death, the party for whose benefit the insurance was effected, although no previous notice was given to the insurers that such evidence would be offered, is not estopped from proving at the trial of a suit on the policy that a statement of the age of the deceased accompanying such proofs, and differing from that made in the application, is erroneous. *Connecticut Mutual Life Insurance Co.* v. *Schwenk*, 593.

9. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be

ESTOPPEL (*continued*).

shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. *Russell* v. *Place*, 606.

10. If, upon the face of a record, any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. *Id.*

11. The defendant, having been indicted under a statute of Alabama for setting up and carrying on a lottery without legislative authority, claimed in defence a right to set up and carry on the lottery in question under a subsequent statute passed on the 10th of October, 1868; this latter statute was repealed in March, 1871. It was admitted on the trial that the acts charged against the defendant were done under that statute, and would be legal if the statute were constitutional, and had not been repealed. That statute required the defendant, and certain other parties associated with him, before exercising the right claimed, to deposit in the treasury of the State, to the credit of the school fund, and for educational purposes, $2,000, and annually thereafter the same sum for twenty years, or so long as they might do business under the act; and that sum had been deposited. Under a previous indictment against the same defendant for a similar offence, the Supreme Court of the State had held that the statute in question constituted a contract, and that the repealing act was, for that reason, void. In that case, the only matter before the court was the meaning of the statute; its constitutionality was not called in question. On the trial of the case at bar, the defendant relied upon that decision of the court, but he was, nevertheless, convicted and sentenced. On appeal to the Supreme Court of the State, the judgment was affirmed, the court deciding that the statute of Oct. 10, 1868, was unconstitutional. *Held*, that the previous adjudication of the court upon the meaning of the statute — that it constituted a contract between the defendant and the State — did not estop the State from denying its constitutionality in the present case, nor conclude the court upon that question, although the point might have been raised and determined in the first instance. *Boyd* v. *Alabama*, 644.

12 The Court of Appeals of Maryland, in a suit whereto the parties to this suit were parties, rendered a decision adverse to the right of the holder of coupons attached to the preferred bonds issued by the Chesapeake and Ohio Canal Company, under an act of that State of

ESTOPPEL (*continued*).

March 10, 1845, entitled "An Act to provide for the completion of the Chesapeake and Ohio Canal to Cumberland, and for other purposes," to receive, out of the net revenues and tolls of the company, interest on such coupons from the time they respectively mature. In conformity with that decision, the Circuit Court of Baltimore City, in the same suit, entered a decree distributing those revenues and tolls, and ordering payment of the coupons from time to time as the same should accrue. *Held*, that the parties to this suit are bound by that decree. *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 741.

18. The fact that one of the parties then appeared as a trustee for the bondholders does not render the decree less conclusive in a suit where his individual rights in the same subject-matter are involved. If he, at that time, owned any such bonds or coupons, he is bound, because he was representing himself. If he bought them since, he is bound as privy to the person who was represented. *Id.*

EVIDENCE. See *Estoppel*, 6, 9, 10; *Equity*, 8; *Practice*, 20; *Sale for Taxes*.

1. Within the scope of the professional employment of an attorney, the communications made to him by his client are privileged, and, without the consent of the latter, he should neither be required nor permitted by the courts of the United States to testify concerning them. *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 457.
2. As the effect of the statute of Iowa is to make an occupant of land in that State, who, under color of title thereto, and in good faith, has made valuable improvements thereon, the owner of the improvements, the question as to the ownership of the land is immaterial in an action to recover for their wilful or negligent destruction. *Milwaukee & Saint Paul Railway Co.* v. *Kellogg*, 469.
3. Where the subject of a proposed inquiry before a court is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions. *Id.*
4. The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances. *Id.*
5. A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. *Id.*
6. The finding of the jury in this case, that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendants' elevator, which had been caused by their negligence,

EVIDENCE (*continued*).
is, in effect, a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. *Id.*
7. An entry in the minute-book of a lodge of odd fellows of which a deceased person was a member, made prior to the issue of a policy of insurance upon his life, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, is not admissible as evidence of such age. It is merely hearsay. *Connecticut Mutual Life Insurance Co.* v. *Schwenk*, 593.
8. The doctrine in *Insurance Company* v. *Wilkinson*, 13 Wall. 222, and *Insurance Company* v. *Mahone*, 21 id. 122; as to the admissibility of parol testimony to show that the answers to questions in an application for a policy of life insurance, as construed, interpreted, and written down by an agent of the company, were not those of the applicant, affirmed and applied to this case. *New Jersey Mutual Life Insurance Co.* v. *Baker*, 610.

EXCHANGE OF STATIONS. See *Military Stations*, 1, 2; *Officers of the Army*, 1, 2.

EXECUTION. See *Garnishee*, 1, 2; *Prescription*, 1–3; *Supersedeas*.

EXECUTORS AND ADMINISTRATORS.
1. In Arkansas, the real as well as the personal estate of the intestate is assets in the hands of an administrator; but neither species of property can be sold without an order of the Probate Court. *Tate* v. *Norton*, 746.
2. A claim admitted by the administrator, and allowed and classified by the Probate Court, has in that State the dignity and effect of a judgment. *Id.*
3. There can be no *devastavit* which will sustain an action against an administrator appointed in that State until he has violated an order of the Probate Court to pay creditors; and his accounts settled by that court cannot be collaterally attacked, but are conclusive, until, by a direct proceeding in equity instituted for that purpose, they are impeached for fraud or mistake. *Id.*

EXPERTS, TESTIMONY OF. See *Evidence*, 2, 3.

FEDERAL QUESTION. See *Practice*, 37.

FEIGNED ISSUE. See *Practice*, 23, 25.

FISHERIES.
Subject to the paramount right of navigation, the regulation of which in relation to foreign and inter-state commerce has been granted to the United States, each State owns the beds of all tide-waters within its jurisdiction, and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. *McCready* v. *Virginia*, 891.

FORECLOSURE. See *Appeal*, 4; *Bonds*, 3; *Mortgage*, 4, 5.

FRANCHISES, FORFEITURE OF.

The question of the forfeiture by the Chesapeake and Ohio Canal Company of their right to hold, free from taxation, property after they ceased to use it for canal purposes, can be judicially determined only in a direct proceeding by the public authorities. It cannot be made an issue for the first time in the trial of a question of private right between other parties. *Mackall* v. *Chesapeake & Ohio Canal Co.*, 308.

FRAUD. See *Assignee in Bankruptcy; Bankruptcy*, 1; *Contracts*, 5; *Negotiable Instruments*, 1, 4, 6.

Fraud is generally a question of fact to be determined by all the circumstances of the case. *Humes* v. *Scruggs*, 22.

GARNISHEE.

1. In Kansas, an order of a court in a proceeding in aid of execution directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor is not a judgment, and does not determine finally the liability of the garnishee. *Atlantic & Pacific Railroad Co.* v. *Hopkins*, 11.
2. Therefore, in such a proceeding, an order of the Circuit Court of the United States, sitting in that State, awarding execution against a garnishee, is erroneous. *Id.*

HIGH-WATER MARK. See *Commerce*, 3–7; *Riparian Proprietors*, 1–3.

HUSBAND AND WIFE. See *Assignee in Bankruptcy; Bankruptcy*, 1; *Mortgage*, 6.

1. Purchases of real or personal property, made during coverture, by the wife of an insolvent debtor, are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof. *Seitz* v. *Mitchell*, 580.
2. The earnings of the wife while cohabiting with her husband are not, by the Revised Statutes relating to the District of Columbia, made her separate property. She can have them only by his gift, and it is not protected against his creditors. *Id.*

ILLINOIS. See *Constitutional Law*, 4; *Judicial Comity*, 5; *Municipal Bonds*, 8, 12.

The Supreme Court of Illinois, by a long course of decisions, has held that, under the Constitution of 1848, a statute of that State is not valid unless the legislative journals show that it was passed by a majority of all the members elect in each house of the general assembly. *Town of South Ottawa* v. *Perkins*, 260.

INDEMNITY. See *Surety*.

INDIANA, SCHOOL LANDS IN.

1. The Supreme Court of Indiana having decided in this case that the moneys arising from section 16 in each congressional township of that State, all of which are to be paid into the county treasury by the school trustee, form a part of the school fund which the county auditor is required to distribute to the various townships in the county, and that, in so doing, he is bound by the proviso in the act of March 4, 1855, "that in no case shall the congressional township fund be diminished by such distribution, and diverted to any other township," this court affirms the decision. *Davis* v. *Indiana*, 792.
2. This court adheres to the ruling in *Springfield Township* v. *Quick*, 22 How. 56, that the right of the inhabitants of the several congressional townships in that State to such moneys for the use of schools in the township where section 16 lies, is sufficiently protected by that proviso. *Id.*

INDIANS.

A. settled upon land belonging to the Indians of the village or pueblo of Taos, in New Mexico. *Held*, 1. That he was not liable under the acts of Congress which prohibit a settlement by any person on land belonging, secured, or granted by treaty with the United States, to any Indian tribe. 2. That they have a complete title to their land, and are not an Indian tribe within the meaning of those acts. *United States* v. *Joseph*, 614.

INDORSER AND INDORSEE. See *Negotiable Instruments*, 2, 4, 6–9.

INFRINGEMENT. See *Letters-Patent*, 3, 4, 7, 8, 10.

INJUNCTION. See *Equity*, 6–8; *Practice*, 34.

INJURY, PROXIMATE CAUSE OF. See *Evidence*, 3–6.

INSURANCE. See *Life Insurance*.

1. Unless prohibited by statute or other positive regulation, a valid contract of insurance can be made by parol. *Relief Fire Insurance Company of New York* v. *Shaw*, 574.
2. There is nothing in the charter of the Relief Fire Insurance Company of New York, nor in c. 196, sect. 1, of the acts of Massachusetts for 1864, which prohibits it from entering into such a contract in the latter State. *Id.*
3. The correspondence in this case considered, and held to create a valid contract for a policy of insurance in the Home Insurance Company of New York for $4,000 on the mill and machinery of the complainants, situated at Staunton, Ill., for one year from Oct. 12, 1872. at the rate of six and a half per cent premium. *Eames* v. *Home Insurance Co.*, 621.
4. It appearing that the property was destroyed by fire Oct. 29, 1872, whereby loss and damage accrued to the complainants to the whole

INSURANCE (*continued*).

amount of insurance, that due proof and notice were given, and that the premium for said insurance was tendered and refused, the complainants are entitled to a decree against the defendant for $4,000, less the amount of said premium, with interest and costs. *Id.*

INTEREST. See *Mortgage*, 2, 3.

1. The court adheres to the rule in *The Diana*, 3 Wheat. 58, allowing interest from the date of the decree of condemnation in the District Court, upon the appraised value of the property seized for a violation of the revenue laws. *One Hundred and Ninety-nine Barrels of Whiskey* v. *United States*, 86.
2. A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit. *National Bank of the Commonwealth* v *Mechanics' National Bank*, 437.
3. The interest being a liquidated sum at the time of the payment of the deposit, an action lies to recover it, and interest thereon. *Id.*

INTERNAL REVENUE.

1. A., who died Dec. 4, 1867, devised his real estate to his widow for her life, with remainder over to B. She died June 17, 1872, when B. entered. *Held*, that an internal revenue tax could not be legally assessed May 15, 1873, on B.'s succession. *Clapp* v. *Mason*, 589.
2. A penalty of $1,000 is the only liability incurred by a railroad company for failing to comply with the provisions of sect. 122 of the internal revenue act of June 30, 1864 (13 Stat. 284), as amended by the act of July 13, 1866 (14 id. 138). *Erskine* v. *Milwaukee & St. Paul Railway Co.*, 619.

INTER-STATE COMMERCE. See *Constitutional Law*, 1, 5, 7; *Fisheries*; *Warehouses*.

IOWA. See *Constitutional Law*, 5; *Corporations*, 3; *Evidence*, 2; *Riparian Proprietors*, 1–3.

Although no permanent obstruction, like a depot building, can be erected on the streets of a town, it is held in Iowa that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietor, and without compensation, whether the fee of the streets be in him (as in the city of Keokuk) or in a third person. *Barney* v. *Keokuk*, 324.

JUDGMENT. See *Estoppel*, 1–3, 5, 6; *Garnishee*, 1, 2; *Practice*, 15, 17; *Supersedeas*.

A judgment duly entered by a court having jurisdiction of the parties and of the subject-matter in controversy, is, notwithstanding irregularities in matters of form, binding, until set aside or reversed. *Gunn* v. *Plant*, 664.

JUDICIAL COMITY. See *Municipal Bonds*, 8.

1. This court adopts the decision of the Supreme Court of Kansas, affirming the validity and binding effect of an act of the legislature of that State, approved Feb. 10, 1865, entitled "An Act to authorize counties and cities to issue bonds to railroad companies," although the yeas and nays were not called and entered on the journals of the respective houses on the final passage of the bill, and the enrolled bill was not signed by the presiding officer of the senate. *County of Leavenworth* v. *Barnes*, 70.
2. The decision of the Supreme Court of the State of Wisconsin, that the act of the legislature approved March 11, 1874, entitled "An Act relating to railroads, express and telegraph companies, in the State of Wisconsin," was not repealed by that entitled "An Act in relation to railroads," approved March 12, 1874, is binding upon this court. *Peik* v. *Chicago & North-Western Railway Co.*, 164.
3. As giving a construction to the State Constitution and statute, this court accepts the decision of the Supreme Court of Wisconsin, that the charter of the Milwaukee and Waukesha Railroad Company, granted by the Territory, is subject to repeal or alteration, inasmuch as it was not accepted, nor was the company organized, until after the admission of the State into the Union, under a constitution which continued that act in force, and provided that all laws for the creation of corporations might be altered or repealed by the legislature at any time after their passage. *Stone* v. *Wisconsin*, 181.
4. Except where the Federal Constitution and laws are concerned, the courts of the United States, in passing upon the Constitution and statutes of a State, conform to the settled construction of them by the highest State court; and, when the latter holds a pretended act of the legislature to be void and not a law, the courts of the United States are bound to hold accordingly. *Town of South Ottawa* v. *Perkins*, 260.
5. The Supreme Court of Illinois has decided, in two cases, that the act approved Feb. 18, 1857, entitled "An Act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," was never passed, and is not an act of the legislature of that State. This court concurs in that view, and also holds that no subsequent legislation has given any new force to the act, or any validity to the bonds issued, or the proceedings had, under it. *Id.*

JURISDICTION. See *Appeal*, 3.

I. Of the Supreme Court.

1. Under the fifth section of the act of March 3, 1875 (18 Stat. 471), this court has jurisdiction to review an order of a circuit court dismissing a cause, or remanding it to the State court from which it had been removed under the second section of that act. *Hoadley* v. *San Francisco*, 4.

JURISDICTION (*continued*).

2. This court cannot review the action of the Circuit Court in the exercise of its supervisory jurisdiction over an adjudication of bankruptcy rendered by the District Court. *Hill* v. *Thompson*, 322.
3. It is immaterial whether such adjudication was upon a summary hearing by the District Court, or after a trial by jury to ascertain the fact of the alleged bankruptcy. *Id.*
4. This court has no jurisdiction to re-examine the decree of the highest court of a State, reversing that of an inferior court, and remanding the cause for further proceedings. *Davis* v. *Crouch*, 514.

II. Of the Circuit Courts.

5. A decree, foreclosing a mortgage executed by the Chicago and Southwestern Railroad Company of its entire railroad and franchises, and ordering a sale of them, passed by the Circuit Court of the United States for the District of Iowa, which, in a suit there pending, had jurisdiction of the mortgagor and the trustees in the mortgage, is not invalid because a part of the property ordered to be sold is situate in the State of Missouri. *Muller* v. *Dows*, 444.

III. In general.

6. A suit by or against a corporation in a court of the United States is regarded as brought by or against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the State which created it. *Muller* v. *Dows*, 444.
7. There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them. *Ex parte Smith*, 455.

JURY. See *Practice*, 18, 20.

KANSAS. See *Judicial Comity*, 1; *Garnishee*, 1, 2; *Municipal Bonds*, 1, 2, 3, 5, 14, 19, 20.

LACHES. See *Equity*, 10.

LANDLORD AND TENANT. See *Mortgage; Statutory Lien.*

1. Unless excluded by the operation of some express covenant or agreement, there results from the relation of landlord and tenant an implied obligation on the part of the latter not to commit waste, nor, by his failure to exercise reasonable care, permit it to be committed. *United States* v. *Bostwick*, 53.
2. In the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if buildings are accidentally destroyed by fire or otherwise. *Id.*
3. The destruction of ornamental trees, fences, walls, &c., and the quarrying and removal of stone and gravel, is voluntary waste, within the prohibition of the implied agreement, for which the tenant is answerable. *Id.*

LANDLORD AND TENANT (*continued*).

4 Where property was rented by the United States "for all purposes," no recovery can be had on account of its use for a small-pox hospital. *Id.*

5. The acceptance, without objection by the lessor, of reduced rates of rent, after the expiration of the first year, is conclusive evidence of his assent, in consideration of the continued occupancy by the United States, to a modification of the original agreement in that particular. *Id.*

6. Under the act of Congress approved Feb. 22, 1867 (14 Stat. 403), the lien of a landlord for rent has priority over a deed of trust made by his tenant after the commencement of the tenancy, whether the chattels covered by the deed were, when it was executed, upon the demised premises, or were subsequently acquired and placed by the tenant upon them. *Beall* v. *White*, 382.

7. A surrender to a landlord is effected either by words manifesting the intention of the lessee to yield up his estate, or by operation of law, where the parties, without such words, do some act which implies that they both agree to consider the surrender as made. *Id.*

8. In this case, the court holds that there was no surrender, either express or by operation of law. *Id.*

LESSOR AND LESSEE. See *Court of Claims*, 1; *Landlord and Tenant*, 1–5; *Railroad Companies, Legislative Control of their Rates of Fare and Freight*, 2, 3.

LETTERS-PATENT.

1. Letters-patent No. 102,918, issued to John L. Mason, May 10, 1870, for an "improvement in fruit-jars," are void: *first*, because there was a purchase, sale, and prior use of the invention more than two years prior to the application for a patent; *second*, because, at the time of such application, the invention had been abandoned to the public. *Consolidated Fruit-Jar Company* v. *Wright*, 92.

2. In letters-patent of the United States, No. 10,965, bearing date May 23, 1854, issued to John Myers and Robert G. Eunson, granting to them, for the term of fourteen years from that date, the exclusive right and liberty of making, using, and vending to others to be used, an improved machine for sawing thin boards, &c., which letters-patent were subsequently extended for the term of seven years from May 23, 1868, the claim of the improvement described as the employment or use of deflecting plates, — one or two, — placed at the sides of a circular saw, for the purposes set forth in the specification, is void, because it does not describe a patentable invention. *Dunbar* v. *Myers*, 187.

3. This court finds that the respondents below did not infringe the second and fourth claims of the patent. *Id.*

4. This court finds that letters-patent No. 80,492, granted to William H. Cammeyer, bearing date July 28, 1868, for an improved portable

LETTERS-PATENT (*continued*).
and adjustable still-water dam, were not infringed by the defendant. *Cammeyer* v. *Newton*, 225.
5. The claims embraced by the patent, and the nature and mode of operation of the invention which is therein described, and of the machine or apparatus used by the defendant in alleged violation of the patent, examined. *Id.*
6. The alleged new and useful improvement in mechanism for marking cloth in sewing-machines, for which letters-patent No. 28,633, bearing date June 5, 1860, were issued to Henry W. Fuller and Anthony W. Goodell, consists only of a combination of old elements or ingredients constituting an apparatus for effecting the results described in the specification. *Fuller* v. *Yentzer*, 288.
7. The rights of the holder of such a patent are not infringed, unless it appears that, without his authority, the entire combination is made, used, or sold. *Id.*
8. The apparatus used by the respondents, and that for which said letters-patent were awarded, described, and the conclusion reached, that they essentially differ in their construction and mode of operation. *Id.*
9. Reissued letters-patent No. 3,218, granted Dec. 1, 1868, to Henry W. Fuller, assignee, by mesne assignments, of Israel M. Rose, for an improvement in a tuck-creasing attachment in sewing-machines, were not superseded by letters-patent No. 28,633, issued June 5, 1860, to Henry W. Fuller and Anthony W. Goodell. *Fuller* v. *Yentzer*, 299.
10. The court holds that the apparatus constructed, used, and sold by the respondents, do not infringe the complainants' patent. *Id.*
11. Letters-patent No. 90,284, issued to Joshua Merrill, May 18, 1869, for improved manufacture of deodorized heavy hydrocarbon oils, construed and held to be good for the superheating coil, with its steam-pipe, &c., referred to in the second claim of the specification, and for the described process by which the oil is deodorized, but not for the product of that process. *Merrill* v. *Yeomans*, 568.
12. In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep skin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. *Held*, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for

LETTERS-PATENT (*continued*).

an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim, and invalid as to the others. *Russell* v. *Place*, 606.

13. This court, in affirming the validity of the letters-patent No. 15,687, granted to Joseph D. Cawood Sept. 9, 1856, for "an improvement in the common anvil or swedge-block for the purpose of welding up and re-forming the ends of railroad rails when they have been exfoliated, or become shattered from unequal wear occasioned by the inequalities of the road," &c., which were before it in *Turrill* v. *Michigan Southern, &c. Railroad Co.*, 1 Wall. 491, holds, in addition to what was declared in that case, that they embrace a bottom support for the rail on the anvil; and that they are infringed by the machines known as the "Illinois Central," the "Etheridge," and the "Whitcomb," but not by those known as the "Bayonet vise," the "Michigan Southern," and the "Beebe and Smith." *Cawood Patent*, 695.

14. Where an account for the infringement of letters-patent is prayed for and decreed, the record filed here should set it forth. This court should not be called upon to perform the duties of a master. *Id.*

15. Considering the number of feet of rails mended by the respondents in the use of the machines covered by said letters-patent, and of those which infringe them, the gain in mending, compared with the cost of mending on the common anvil, and the saving in fuel and labor, the damages decreed by the court below are not excessive. *Id.*

16. In settling an account between a patentee and an infringer of his letters-patent, the question is not what profits the latter made in his business, or from his manner of conducting it, but what advantage he derived from his use of the patented invention. *Id.*

17. Reissued letters-patent No. 2,145, granted to Eli W. Blake, Jan. 9, 1866, for an improvement in machines for crushing stones, and extended June 15, 1872, were not anticipated by those granted Sept. 4, 1849, No. 6,690, to Hobbs & Brown, for crushing ice, nor by those granted Jan. 3, 1854, No. 10,365, to James Hamilton, for an ore-crusher. *Blake* v. *Robertson*, 728.

18. The court sustains the validity of said letters-patent to Blake, and finds that they have been infringed by the respondent. *Id.*

19. In an action for the infringement of letters-patent, damages must be proved, and the burden of proof is upon the complainant. *Id.*

20. In this case, no license fee charged by the complainant is shown, although it appears that he made a profit of forty dollars per inch

LETTERS-PATENT (*continued*).

on the width of the jaws of the machines sold by him. They, however, embraced inventions covered by patents other than that for the infringement of which this suit was brought. *Held*, that, in the absence of proof to show how much of profit was due to such other patents, and how much was a manufacturer's profit, he is entitled to nominal damages only against the respondent. *Id.*

21. The powers and jurisdiction of the Supreme Court of the District of Columbia, in patent cases, are the same, as well in equity as at law, as those of the Circuit Courts of the United States; and whether a case, involving the validity or the infringement of letters-patent, shall be first tried at law is a matter of discretion and not of jurisdiction. *Cochrane* v. *Deener*, 780.

22. The improvement in processes for manufacturing flour, for which reissued letters-patent No. 5,841 were granted to William F. Cochrane and his assignees, April 21, 1874, being a reissue of letters-patent No. 87,317, granted to him Jan. 6, 1863, does not consist in using drafts or currents of air, but in the process as a whole, comprising the application of the blast, and the carrying off the fine impurities whereby the middlings, after being separated from the other parts, are purified, preparatory to regrinding. *Id.*

23. A process may be patentable, irrespective of the particular form of the instrumentalities used. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but, if the patent is not confined to that particular tool or machine, the use of the other would be an infringement, the general process being the same. *Id.*

24. A process is a mode of treatment of certain materials to produce a given result. It is an act or a series of acts, performed upon the subject-matter, to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. In the language of the patent law, it is an art. *Id.*

25. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence. *Id.*

26. The court holds that reissued letters-patent No. 5,841, bearing date April 21, 1874, for improvements in processes for manufacturing flour, No. 6,030, bearing date Aug. 24, 1870; No. 6,594 and No. 6,595, bearing date Aug. 17, 1875, for improvements in machines for bolting flour, and issued to William F. Cochrane and his assignees, — are valid, and were infringed by the defendants, in using

LETTERS-PATENT (*continued*).
machines constructed according to reissued letters-patent No. 5,346, bearing date April 1, 1873, being a reissue of letters-patent No. 135,953, bearing date Feb. 18, 1873, and granted to Edward P. Welch and his assignees, for improvements in middlings-purifiers, and being for improvements upon machines patented to Jesse B. Wheeler and Ransom S. Reynolds; but that letters-patent No. 37,319 and No. 37,320, bearing date Jan. 6, 1863, issued to said Cochrane, for improvements in bolting flour, were not infringed. *Id.*

LIEN. See *Admiralty*, 3–5; *Judgment; Landlord and Tenant*, 6; *Mortgage*, 5; *Statutory Lien.*

In Georgia, the omission to record the verdict upon which the judgment was rendered does not deprive the plaintiff of his lien upon the real estate of the defendant. *Gunn* v. *Plant*, 664.

LIFE INSURANCE. See *Estoppel*, 8; *Evidence*, 7, 8.

1. A policy of life insurance originally valid does not cease to be so by the cessation of the assured party's interest in the life insured, unless such be the necessary effect of the provisions of the instrument itself. *So held*, where, subsequently to effecting an insurance by husband and wife, upon their joint lives, payable to the survivor on the death of either, they were divorced *a vinculo matrimonii*, and she, having thereafter paid the premiums to the time of his death, brought suit on the policy. *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 457.
2. Any person has a right to procure an insurance on his own life, and assign it to another, provided it be not done by way of cover for a wager policy. *Id.*
3. The relationship between a party and another for whose benefit he effects an insurance upon his life, if a good and valid consideration in law for any gift or grant, furnishes no ground for the imputation that the transaction was by way of cover for a wager policy. *Ætna Life Insurance Co.* v. *France*, 561.
4. A policy of insurance, taken out by a man upon his life for the benefit of his sister, who has no insurable interest in his life beyond that of relationship, is not void; and it is immaterial what is the arrangement between them for the payment of the premiums. *Id.*

LOUISIANA. See *Commerce*, 2; *Prescription*, 1–3.

MANDAMUS. See *Appeal*, 2; *Practice*, 21, 22, 26.

1. To entitle a petitioner to a writ of *mandamus* to compel a circuit court to allow an appeal from its decree, he must show that he has a clear right to an appeal which has been refused him by that court. *Ex parte Cutting*, 14.
2. *Mandamus* does not lie to compel a circuit court to allow an appeal from its decree by a person not an original party to the suit, unless

MANDAMUS (*continued*).
it appears that his petition to be allowed to intervene was granted, or that he at least acted, or was treated, as a party. *Id.*

MASSACHUSETTS. See *Insurance*, 1, 2.

MECHANICS' LIENS. See *Equity*, 5.

1. Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and that requires them to prove when the work was commenced, the character of the work, and when it was completed. *Davis* v. *Alvord*, 545.

2. Work was done by the plaintiff, under a contract with the defendant made Aug. 1, 1869, on two distinct parcels of property situated in Montana Territory, — one a quartz-mill and the other a quartz-mine, — separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870 Nothing was done afterwards except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due to the plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount as thus apportioned were accordingly filed in the recorder's office. *Held*, 1st, That a lien did not arise from this contract of apportionment, or from the special contract under which the work was done, but from the work itself, which was performed upon the property; 2d, That the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other; 3d, That the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work; and that the occasional repairs subsequently made could not be added to the work done months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs; 4th, That it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage. *Id.*

MERGER. See *Sale for Taxes.*

MILEAGE. See *Officers of the Army*, 2.

MILITARY STATIONS. See *Officers of the Army*, 1, 2.

1. The home of the officer to which he is ordered is not a military station. A military "station" is merely synonymous with military "post."

MILITARY STATIONS (*continued*).

In each case it means not an ordinary residence, having nothing military about it, except that one of its occupants holds a military commission, but a place where military duty is performed, or stores are kept or distributed, or something connected with war or arms is kept or done. *United States* v. *Phisterer*, 219.

2. An officer so ordered is not, when at home awaiting orders, entitled to commutation for quarters and fuel. His home is not a "station," within the meaning of sect. 1080 of the Army Regulations. *Id.*

MINERAL LANDS.

1. Although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and, becoming personal property, are, as such, subject to State taxation in like manner as other personal property. *Forbes* v. *Gracey*, 762.
2. The words "mines or mining claims" in the sixth section of the act of the legislature of Nevada of Feb. 28, 1871, imposing a tax upon such ores, and making it "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the miner is the owner of the soil, and therefore has a perfect title to the mine, and those in which he works under a mining claim, the title to the land remaining in the United States. In the first case, the tax is a valid lien on the mine itself; but in the second, only upon his possessory right, under existing laws and regulations, to work and explore the mine. *Id.*
3. Such a claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the non-payment of them, without infringing the title of the United States. *Id.*

MINNESOTA. See *Constitutional Law*, 8.

MISSOURI. See *Municipal Bonds*, 24, 25, 28, 29.

1. Under the Code of Practice of Missouri, if any one of the defences set up in the answer is a bar to the plaintiff's right to recover, a demurrer to the whole answer must be overruled. *County of Dallas* v. *MacKenzie*, 660.
2. A county in Missouri, sued on certain coupons attached to bonds alleged to have been issued by it, denied in its answer the plaintiff's ownership for value, and, for a further defence, averred that no orders authorizing the issue of such bonds were ever made by the proper county court, but that two of the justices thereof fraudulently and corruptly, but not as a court, made a certain other order, upon conditions which were not complied with. It further averred that such bonds were fraudulently and corruptly issued, and without authority. No copy of the bonds was filed with the plaintiff's complaint. The plaintiff demurred to the answer. *Held*, that the demurrer must be overruled. *Id.*

MONTANA, CIVIL PRACTICE ACT OF.

Under the Civil Practice Act of Montana, judgment cannot be entered against a defendant, as upon default for want of issues to be tried, where there is on file in the cause an answer specifically denying, upon information and belief only, all the allegations in the complaint, if it appears that the facts in controversy were not within the personal knowledge of the defendant, and that the information upon which he based his belief came from his agents employed to transact the business out of which the litigation arose. *Maclay* v. *Sands*, 586.

MORTGAGE. See *Equity*, 10; *Jurisdiction*, 5; *Waiver*.

1. It is only where no rule of law is infringed, and the rights of third persons are not prejudiced, that courts of equity will, in certain cases, give effect to mortgages of subsequently acquired property. *Beall* v. *White*, 382.
2. Where a railroad company issues its bonds, and mortgages its property to secure the payment of them and of the semiannual instalments of interest thereon, as they respectively fall due, under the authority of an act of the legislature, which declares that the bonds shall not mature at an earlier period than thirty years, a provision in them, that, upon a failure to pay any coupon thereto attached, when presented at the place of payment, and a continued default thereon for six months, the whole sum mentioned in the bond shall become due and payable, is void. *Howell* v. *Western Railroad Co.*, 463.
3. In such a case, the mortgage may provide that it shall be foreclosed upon non-payment of interest. When suit in foreclosure is brought, if the sum ascertained to be due on the coupons be paid within such reasonable time as the court shall appoint, no further proceedings in the suit can be had until there is another default; if the sum be not so paid, a sale of the property, with a foreclosure of all the rights subordinate to the mortgage, should be ordered, with a direction to bring the proceeds into court, when, in distributing them, the sums secured by the mortgage must be protected, according to their respective priority of lien. *Id.*
4. Prior mortgagees are not necessary parties to the bill of a junior mortgagee, which seeks only the foreclosure or the sale of the equity of redemption. *Jerome* v. *McCarter*, 784.
5. Neither the mortgagor nor his assignee in bankruptcy can object to the order in which the priority of valid and subsisting liens on the mortgaged premises is fixed by the decree of foreclosure. *Id.*
6. A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns for ever," vests in her, under the laws of that State, a statutory separate estate; and a mortgage of the lands, exe-

MORTGAGE (*continued*).

cuted by her and her husband to secure the payment of his debts, is void. *Lippincott* v. *Mitchell*, 767.

7. A company, to secure the payment of its bonds, mortgaged its property, and the rents, issues, and profits arising therefrom, with the provision, that, if there was default in paying the interest, the mortgagee might take possession of the property, manage the same, and receive and collect all rents and claims due and to become due to the company. Default was made; and the mortgagee, in November, 1874, filed his bill, setting forth that the company had on hand moneys and claims due to it, both of which he prayed might be applied to his mortgage. An execution upon a judgment, which B. had against the mortgagor, having been sued out and returned *nulla bona*, he, in December of that year, filed his bill to subject such moneys and claims to the payment of his judgment. *Held*, that, inasmuch as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing his bill must be postponed to that of B. *American Bridge Co.* v. *Heidelbach*, 798.

MUNICIPAL BONDS. See *Estoppel*, 2, 8; *Judicial Comity*, 1, 5.

1. Where the question of subscribing to the stock of a railroad company was, prior to the passage of the act of the legislature of Kansas, approved Feb. 10, 1865, entitled "An Act to authorize counties and cities to issue bonds to railroad companies," duly submitted to the qualified voters of the county, who voted to subscribe stock and issue bonds therefor, the board of county commissioners was, by that act, authorized to make the subscription, and issue bonds not exceeding the amount provided in the first and third sections thereof. *County of Leavenworth* v. *Barnes*, 70.
2. The bonds issued by the county of Leavenworth, Kansas, bearing date July 1, 1865, and reciting that they are issued in payment of the subscription of said county to the capital stock of the Leavenworth and Missouri-Pacific Railroad Company, under the provisions of the act of the legislature of Kansas, entitled "An Act to authorize counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, are, in the hands of a *bona fide* holder for value, valid and binding upon the county. *Id.*
3. Under the act of the legislature of Kansas, to authorize counties and cities to issue bonds to railroad companies, approved April 10, 1865, and that of Feb. 25, 1868, the board of commissioners of a county is authorized to determine whether the condition precedent to the lawful issue of such bonds has been complied with. *Commissioners of Douglas County* v. *Bolles*, 104.
4. A recital by the board in the bonds, showing that such condition has been complied with, is, when they are in the hands of a *bona fide*

MUNICIPAL BONDS (*continued*).
holder for value, binding upon the county; and he is bound to look for nothing behind the recital except legislative authority for the issue of them. *Id.*

5. Where, upon the performance of certain conditions precedent, the issue of bonds to a railroad company by the board of commissioners of a county in Kansas is authorized by law, the bonds, when issued, if they recite such performance, are, in the hands of a *bona fide* holder for value, binding upon the county. *Commissioners of Johnson County* v. *January*, 202.
6. The acceptance and holding by the county of the certificate of stock of the company, the issue and delivery of the bonds to the company, and the payment of interest on them for a time, cured the defects, if any existed, as to the order for submitting the question of subscription to a popular vote, and authorized a *bona fide* taker of the bonds to presume that every thing necessary to their validity had been properly done. *Id.*
7. The fact that the act under which the bonds were issued is erroneously referred to in their recitals does not render them void. *Id.*
8. This court concurs in opinion with the Supreme Court of Illinois, that the fifth section of the act of the general assembly of that State, approved Feb. 18, 1861, conferred no authority upon a municipal corporation to subscribe to the capital stock of the Paris and Decatur Railroad Company. *Township of East Oakland* v. *Skinner*, 255.
9. The township of East Oakland subscribed to that capital stock without being thereunto authorized, and its bonds, bearing date April 20, 1871, and reciting that they are issued in payment of such subscription, are void. *Id.*
10. Where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them. *Id.*
11. A municipal corporation cannot, without legislative authority, issue bonds in aid of an extraneous object. Every person dealing in them must, at his peril, take notice of the existence and terms of the law which, it is claimed, conferred the power to issue them, no matter under what circumstances he may obtain them. *Town of South Ottawa* v. *Perkins*, 260.
12. The town of Ottawa and the board of supervisors of Kendall County, municipal corporations in Illinois, having issued the bonds in suit, by virtue of a pretended act of the general assembly, approved Feb. 18, 1857, which was duly published among the printed statutes of that State as a law, and, therefore, *prima facie* valid, were not estopped from denying its passage, notwithstanding the holder of the bonds was a *bona fide* purchaser without actual notice. *Id.*
13. Bonds issued, pursuant to legislative authority, by a municipal corporation, in aid of a railroad company, are negotiable instruments *Commissioners of Marion County* v. *Clark*, 278.

MUNICIPAL BONDS (*continued*).

14. Where a statute of Kansas authorized towns or counties to issue bonds "for the purpose of building bridges, or to aid in the construction of railroads, water-power, or other works of internal improvement," and where another statute declared all custom grist-mills to be "public mills," and regulated their management, — *Held*, that bonds issued by a town of that State, to aid in the construction and equipment of a steam custom mill owned by an individual, were authorized by the statute. *Township of Burlington* v. *Beasley*, 310.
15. A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. *McClure* v. *Township of Oxford*, 429.
16. If any of the essential proceedings prescribed by law for investing municipal officers with power to subscribe for stock, and issue bonds in payment thereof, be dispensed with, the bonds will be invalid in the hands of all who cannot claim protection as *bona fide* holders. *Id.*
17. Every dealer in municipal bonds, which, upon their face, refer to the statute under which they were issued, is bound to take notice of all its requirements. *Id.*
18. Where, upon their face, the coupons refer to the bonds to which they were attached, and purport to be for the semiannual interest accruing thereon, the purchaser of them is charged with notice of all which the bonds contain. *Id.*
19. The bonds issued by the township of Oxford, Kansas, bearing date April 15, 1872, and reciting that they are issued under an act of the legislature of Kansas, approved March 1, 1872, authorizing the township to subscribe for stock in the Oxford Bridge Company, and, in pursuance of a vote of the qualified electors of said township, at an election held therein, April 8, 1872, are void, because, as that act by its terms took effect only from its publication in the "Kansas Weekly Commonwealth," and it was not published until March 21, the election was not held pursuant to a notice of thirty days, as required by the act. *Id.*
20. Under the act of the legislature of Kansas, approved Feb. 10, 1865, authorizing the board of county commissioners of any county to, into, through, from, or near which any railroad is or may be located, to subscribe to the capital stock of the company, the location of the road is not a condition precedent to submitting the question of subscription to a vote of the qualified electors of the county. *Commissioners of Johnson County* v. *Thayer*, 631.
21. A proposition was submitted to the electors of Johnson County, whether the board should be "authorized to subscribe capital stock in the name and for the benefit of Johnson County, in the sum of $100,000, to aid in the construction of a railroad commencing at or near the Union Depot, on the south side and near the mouth of the

MUNICIPAL BONDS (*continued*).

Kansas River, and near Kansas City; thence to Olathe, in Johnson County; thence, in a southerly direction, through said county to the southern boundary of the State of Kansas." *Held*, that, under the statute, this was a sufficiently specific description of the route of the contemplated road, and that it was not necessary to insert the name of the company constructing it. *Id.*

22. Irregularities or informalities, not involving the question of jurisdiction nor affecting the result of the vote, do not impair the validity of the bonds issued pursuant to the election; and the Curative Act of Feb. 25, 1868, was intended by the legislature of Kansas to reach the bonds issued before as well as those after its passage. *Id.*

23. Notice to one of the trustees appointed by the company in its deed mortgaging its property, including the county bonds, to secure the payment of its bonds, issued and negotiated for value to third parties, does not, in a suit by the trustees to enforce the payment of the county bonds, operate to destroy the *bona fide* holding of such parties. *Id.*

24. The fourteenth section of article 11 of the Constitution of Missouri, adopted in 1865, which declares that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," prohibits any subsequent legislative grants to any municipal corporation, of authority to become a stockholder in, or to loan its credit to, a company, except upon the prescribed conditions; but it does not purport to take away any authority already granted. *County of Scotland* v. *Thomas*, 682.

25. The Alexandria and Bloomfield Railroad Company was incorporated under an act of the general assembly of Missouri, approved Feb. 9, 1857, which provided that "it shall be lawful for the county court of any county, in which any part of said road may be, to subscribe to the stock of said company," and issue its bonds therefor. The laws of the State reserved to the general assembly the right to amend the charter, and the company was, pursuant to the authority conferred by the act of March 2, 1869, consolidated with a corporation in Iowa, having like authority from that State; but the general direction of the road was not thereby changed. The road of the company passes through the county of Scotland; and the county court, in the absence of any election by the qualified electors of that county, subscribed, in August, 1870, to the capital stock of said consolidated company, and issued the bonds of the county in payment therefor. *Held*, 1. That the power of the county to subscribe for stock in the Alexandria and Bloomfield Railroad Company was the right and privilege of the company, and passed, with its other rights

MUNICIPAL BONDS (*continued*).

and privileges, into the new conditions of existence which it assumed under the consolidation. 2. That the subscription made by the court was the act of the county, and binding upon it, and that the bonds so issued are valid. *Id.*

26. *Harshman* v. *Bates County*, 92 U. S. 569, is not in conflict with the rulings in this case. *Id.*

27. In a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons annexed to bonds issued by it, under authority conferred by law, questions of form merely, or irregularity, or fraud, or misconduct on the part of its agents, cannot be considered. *Town of East Lincoln* v. *Davenport*, 801.

28. Where an act of the legislature of Illinois, authorizing a town to subscribe to the capital stock of a certain railroad company, provides, that if a majority of the legal voters, voting at an election held for that purpose, shall be found to be in favor of such subscription, it shall be deemed and held that such town had taken stock in said company according to the proposals made, — *Held*, that the statute makes such a majority vote equivalent to, and a substitute for, a subscription by the town upon the books of the company. *Id.*

29. Where it was provided by a general law, or the charter of the company when such subscription was made, that the company might consolidate with other companies, in order to carry out the object of its charter, and that its franchises, rights, subscriptions, and credits might be transferred, and where such consolidation was effected, and a subsequent transfer by the consolidated company was lawfully made to a new company engaged in the construction of a connecting road thus forming a continuous line, the stockholders in the former companies becoming stockholders in the new company, — *Held*, that a delivery by the town to such new company of the bonds for the payment of the original subscription, and a receipt of a certificate of stock in it, were warranted by law. *Id.*

NATIONAL BANKS. See *Interest*, 2, 3.

1. The shares of stock of a national bank in New York should be assessed for taxation at their actual value. *People* v. *Commissioners of Taxes and Assessment*, 415.

2. The ruling in *Van Allen* v. *The Assessors*, 3 Wall. 573, as to the invalidity of the act of the legislature of New York of March 9, 1865, known as the Enabling Act, so far as it provided for the taxation of shares in a national bank, reaffirmed. *Id.*

3. The claims of depositors in a national bank at the time of its suspension for the amount of their deposits are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments. *National Bank of the Commonwealth* v. *Mechanics' National Bank*, 437.

NATIONAL BANKS (*continued*).

4. A statute of Vermont is not void, which, for the purposes of taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the State to transmit, on or before the fifteenth day of April in each year, to the clerks of the several towns in the State in which any stock or share holders of such bank shall reside, a true list of the names of such stock or share holders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month. *Waite* v. *Dowley*, 527.
5. When a national banking association is insolvent, the order of the comptroller of the currency, declaring to what extent the individual liability of the stockholders shall be enforced, is conclusive. *Kennedy* v. *Gibson and Others*, 8 Wall. 498, cited and approved. *Casey* v. *Galli*, 673.
6. When his order is to collect an amount equal to the full par value of the stock, the suit by the receiver against the stockholder must be at law, and that amount will bear interest from the date of the order. *Id.*
7. In such a suit the stockholder is estopped from denying the existence or the validity of the corporation. *Id.*
8. No authority other than that conferred by Congress is required to enable a bank existing under a special or a general State law to become a national banking association. The certificate of the comptroller is conclusive as to the completeness of the organization under the act of Congress in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank. *Id.*
9. A plea is bad which sets up that the comptroller has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from these claims, there are means enough to meet the just liabilities of the bank. *Id.*

NAVIGABLE RIVERS. See *Commerce*, 3–7; *Fisheries*.

NEGLIGENCE. See *Evidence*, 5, 6.

NEGOTIABLE INSTRUMENTS. See *Bankruptcy*, 6.

1. Where the title of the original holder of negotiable instruments, which are infected with fraud, invalidity, or illegality, is destroyed, that of every subsequent holder which rests on that foundation, and no other, falls with it. *Commissioners of Marion County* v. *Clark*, 278.
2. Where the first indorsee, without notice of any prior equities between the original parties, purchases, for value, a negotiable instrument, the second indorsee, who acquires it before it is due, and for value, takes a good title, although he had notice of such equities. *Id.*
3. Bonds issued, pursuant to legislative authority, by a municipal corporation in aid of a railroad company are negotiable instruments. *Id.*

NEGOTIABLE INSTRUMENTS (*continued*).

4. The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. *So held*, where a check of the Treasurer of the United States upon a national bank duly designated as a depositary of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank. *First National Bank of Washington* v. *Whitman*, 343.
5. The rights of the parties are not changed by the fact that, on a settlement of accounts between the Treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the bank. Such an error does not affect the real state of the accounts; when it is discovered, they are open to correction. *Id.*
6. Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check. *Id.*
7. An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made. *Davis* v. *Brown*, 423.
8. *Bank of United States* v. *Dunn*, 6 Pet. 51, explained and qualified. *Id.*
9. An agreement like the one mentioned above, and the indorsement, taken together, are equivalent, so far as the holder of the note is concerned, to an indorsement without recourse to the indorser. *Id.*
10. Where a promissory note for dollars, made in Georgia, in January, 1863, is shown to have been solvable in Confederate treasury notes, the sum thereby payable in actual money must be ascertained by the value in coin or legal currency of the United States, at the time when and the place where the note was made, of such treasury notes, equal in nominal amount to the number of dollars specified. *Stewart* v. *Salamon*, 434.
11. Where a payment is indorsed in the same monetary terms which are used in the note itself, the presumption is that it was intended to be credited in the same circulating medium. If the parties intended otherwise, some proof on the subject should be presented. *Id.*
12. Accordingly, where a promissory note for dollars, shown to be solvable, at the time it was made, in Confederate treasury notes, had a receipt for a specified number of dollars indorsed upon it, it was *held* that, in the absence of proof, the principal designated on the face of the note was reduced only by the amount specified in the receipt. *Id.*
13. A negotiable instrument, payable to bearer, or indorsed in blank, produced by a transferee suing to recover its contents, is, when received in evidence, clothed with the *prima facie* presumption that he became the holder of it for value at its date in the usual course of

NEGOTIABLE INSTRUMENTS (*continued*).
business, without notice of any thing to impeach his title. *Collins* v. *Gilbert*, 753.
14. The title of a *bona fide* holder for value of an accepted draft, indorsed in blank, is not affected by the fact that the party from whom he received it before its maturity had possession of it for certain purposes, and misappropriated it. *Id.*

NEW TRIAL. See *Practice*, 15–17, 23.

NEW YORK. See *Commerce*, 1; *National Banks*, 1.

NONSUIT. See *Practice*, 26.

NON-USER. See *Railroad Companies, Legislative Control of their Rates of Fare and Freight*, 3.

OFFICERS OF THE ARMY.
1. An officer of the army, who, under the second section of the act of March 3, 1869 (15 Stat. 318), is ordered from a military post, at which he is doing duty, to his home, to await orders, does not exchange his station, within the meaning of sect. 1117 of the Army Regulations. *United States* v. *Phisterer*, 219.
2. The case is governed by sect. 1110 of such regulations; and under it the officer is entitled to an allowance of ten cents for each mile travelled by him in pursuance of his orders. *Id.*

PARTIES. See *Appeal*, 1, 2; *Mandamus*, 2; *Mortgage*, 4.

PATENTABLE INVENTION. See *Letters-Patent*, 2.

PAYEE. See *Negotiable Instruments*, 4–6.

PLEADING. See *Equity*, 10; *Estoppel*, 5, 6; *Franchises, Forfeiture of*; *Missouri, Practice Code of*, 1, 2; *Mortgage*, 4; *Practice*, 23, 24.
1. A general replication denies every allegation in the answer of a defendant not responsive to the bill. Therefore, he must prove his allegation of a decree in a former suit pleaded by way of estoppel. *Humes* v. *Scruggs*, 22.
2. Defendants who have actually received the consideration of a written agreement cannot, in an action brought against them for a breach of their covenants, set up that the agreement did not bind the plaintiff to perform his covenants, provided it appears that he has performed them in good faith and without prejudice to the defendants. *Storm* v. *United States*, 76.
3. In a suit by or against a corporation in a court of the United States, it should appear by the declaration, or bill of complaint, that the corporation was created by the State whereof the adverse party is not a citizen; but a defective averment of that fact may be cured by the subsequent pleadings. *Muller* v. *Dows*, 444.
4. The principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or the proofs,

PLEADING (*continued*).

or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail, does not require distinct causes of action; that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time, and might be considered together. *Stark* v. *Starr*, 477.

5. A plea of a stockholder of a national bank, when sued to enforce his individual liability, which sets up that the comptroller of the currency has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from these claims, there are means enough to meet the just liabilities of the bank, is bad. *Casey* v. *Galli*, 673.

PLEDGOR AND PLEDGEE. See *Bankruptcy*, 6.

POWER OF ATTORNEY.

1. Where a ratification by an attorney of a deed of settlement is insufficient in form, because of the manner in which he expressed his agency in appending his signature to the instrument declaring the ratification, a court of equity will look beyond the form of the execution, and, having ascertained his intention in signing the instrument, will, if possible, give it the effect intended, if such ratification has been acted upon by others, and has not been objected to by the principal, when called to his attention. *Stark* v. *Starr*, 477.
2. The subsequent action of the principal in asserting a right in severalty to property, which he could only do upon his approval of such ratification by his attorney, will estop him from denying the ratification. *Id.*

PRACTICE. See *Appeal*, 5; *Contracts*, 5; *Court of Claims*, 2, 3; *Letters-Patent*, 14; *Writ of Error*.

1. An objection of the defendant, that the evidence admitted in the court below tended to prove that he was not solely liable to the plaintiff for one of the items of the account sued upon, cannot be made for the first time in this court. *Wheeler* v. *Sedgwick*, 1.
2. Where the questions of title involved in a suit do not arise under the Constitution or the laws of the United States, or a treaty made under its authority, and the parties are citizens of the State where the suit was brought, the Circuit Court does not err in remanding it to the State court from which it was removed. *Hoadley* v. *San Francisco*, 4.
3. Alleged errors, not presented by a bill of exceptions, nor otherwise apparent on the face of the record, are not the proper subjects of re-examination by an appellate tribunal. *Storm* v. *United States*, 76.
4. Questions propounded to a witness, on his cross-examination, merely

PRACTICE (*continued*).

to ascertain the names of persons whom a party may desire to call as witnesses to disprove the case of the opposite party, may be excluded; and it is within the discretion of the presiding judge to determine, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination-in-chief, to what extent a cross-examination, with a view to affect his credibility, shall be allowed. *Id.*

5. This court will refuse to hear a criminal case, unless the convicted party suing out the writ of error is where he can be made to respond to any judgment which may be rendered here. *Smith* v. *United States*, 97.
6. Under the twenty-third rule, in relation to damages, where a writ of error was sued out merely for delay, more than ten per cent upon the amount of the judgment cannot be awarded, but the court may give less. *West Wisconsin Railway Co.* v. *Foley*, 100.
7. Being satisfied that this case is one to which that rule should be applied, the court, affirming the judgment below for $26,333, with costs, awards, in addition to interest, $500 damages. *Id.*
8. Where a party sued out a writ of error, and obtained the allowance of an appeal, and duly filed a transcript of the record here, the court will not, on motion, dismiss the cause; but, when it comes on to be heard, will determine whether it is properly here by appeal or by writ of error, and proceed accordingly. *Hurst* v. *Hollingsworth*, 111.
9. An appeal, although allowed out of term, is not avoided by the non-service of a citation; but this court will impose such terms upon the appellant as, under the circumstances, may be legal and proper. *Dayton* v. *Lash*, 112.
10. The question that the statute of Wisconsin violates the obligation of the consolidated company, under the land grant to the Wisconsin and Superior Railroad Company, to keep the part of its road which formerly belonged to the latter company open as a public highway for the use of the government of the United States, free from toll, &c., can only be raised in a suit between the first company and the United States. *Peik* v. *Chicago & North-Western Railway Co.*, 164.
11. The finding of facts by the Court of Claims, in the nature of a special verdict, is conclusive here, unless impeached for some error in law appearing in the record. *United States* v. *Smith*, 214.
12. That court, in estimating damages, must be governed by the proofs submitted; but it is not required to set forth the elements of the calculation by which it arrives at its final result. *Id.*
13. That court may, however, be asked by either party to state whether a particular item of charge or of damage is included in its finding, and, if so, to what amount. *Id.*
14. Where, by reason of the failure of the appellant to enter into an undertaking to the clerk for the payment of his fees, or otherwise satisfy

PRACTICE (*continued*).

him in that behalf, the appeal has, upon motion of the appellee, been docketed and dismissed, the court will not, on motion of the appellant, at a subsequent term, set aside the order of dismissal, and grant leave to file the record and docket the cause. *Selma & Meridian Railroad Co.* v. *Louisiana National Bank of New Orleans*, 253.

15. The Court of Claims, by granting a new trial after rendering judgment, and while an appeal therefrom is pending here, vacates the judgment, and resumes control of the case and the parties. *United States* v. *Young*, 258.

16. In such a case, a writ of *certiorari* will not be granted to compel that court to send here the proceedings subsequent to the appeal; but the appeal will be dismissed. *Id.*

17. After judgment shall have been finally rendered by the Court of Claims, the proceedings in which the new trial was obtained may be brought here by appeal for review. *Id.*

18. Any State may, by its Constitution and laws, prescribe what shall be conclusive evidence of its statutes; but, on general principles, the question as to the existence or non-existence of a statute is a judicial one, and, though framed in form as an issue in fact, must, when it arises in the courts of the United States, be decided by them, on evidence legally applicable under the laws of the State, without taking the advice of a jury on the subject. *Town of South Ottawa* v. *Perkins*, 260.

19. Stipulations between counsel, relative to the course of proceeding in a cause pending in this court, cannot be withdrawn by either party without the consent of the other, except by leave of the court upon cause shown. *Muller* v. *Dows*, 277.

20. A court is not required to submit evidence to the jury, unless it be of such a character as would warrant a verdict for the party producing it, and upon whom the burden of proof is imposed. *Commissioners of Marion County* v. *Clark*, 278.

21. This court cannot, by *mandamus*, compel an inferior court to reverse a decision made by it in the exercise of its legitimate jurisdiction. *Ex parte Flippin*, 348.

22. *McCargo* v. *Chapman*, 20 How. 555, so far as it conflicts with this doctrine, disapproved. *Id.*

23. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to that court. *Johnson* v. *Harmon*, 371.

24. As the verdict may or may not have been the ground for the decree, an appeal from the latter cannot be made to turn on the judge's rulings at the trial of the feigned issue, but must be decided upon the whole case, pleadings, evidence, and verdict, giving to the latter as much effect as it is worth. *Id.*

25. Where a question put to a witness is in itself unobjectionable, but

PRACTICE (*continued*).

the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such case to the answer. *So held*, where a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, and he stated in his answer what, in his judgment, the quantity was. *Gould* v. *Day*, 405.

26. This court will not by *mandamus* compel an inferior court to grant a motion to vacate an order setting aside a judgment of nonsuit. *Ex parte Loring*, 418.

27. This court, where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss the writ of error before the return-day thereof. *Clark* v. *Hancock*, 493.

28. The rule of equity practice, that when a defendant's answer under oath expressly negatives the allegations of the bill, and the testimony of one person only affirms them, the court will not decree in favor of the complainant, does not extend to so much of the answer as is not directly responsive to the bill. *Seitz* v. *Mitchell*, 580.

29. A party who does not appeal from the final decree of a circuit court cannot be heard in opposition thereto, when the case is properly brought here by the appeal of the adverse party. *The "Stephen Morgan,"* 599.

30. Where a party prosecutes a suit as a representative creditor, and the other creditors, until notice to the contrary, have the right to rely upon him to protect their interest in the subject-matter of the litigation, a notice by the appellees of a motion to dismiss an appeal pending in this court, where he is the appellant, served upon counsel representing him and the other creditors, is insufficient and irregular, if it does not specify the time when such motion will be made, although he may have entered into a stipulation with the appellees consenting to a dismissal of the appeal on their paying the costs *Glenny* v. *Langdon*, 604.

31. Counsel cannot, in requests to the court below, assume the existence of facts, and ask a charge to the jury based upon such assumption; nor, upon argument here, insist that, because the assumption was made, this court is to consider the assumed facts as existing. *New Jersey Mutual Life Insurance Co.* v. *Baker*, 610.

32. Where an appeal has been duly taken, the *supersedeas* which follows from a compliance by the appellant with the act of Congress in that behalf operates to stay the execution of the decree. *Goddard* v. *Ordway*, 672.

33. Where the subject-matter of litigation is the funds in the possession of a receiver, the court below may, notwithstanding the *supersedeas*, give him the requisite orders for their preservation; but it cannot place them beyond the control of a decree that may be made here. *Id.*

PRACTICE (*continued*).

34. Should that court, by mistake or otherwise, proceed to carry its decree into effect, its action may be restrained by the appropriate writ from this court. *Id.*

35. An objection that leave was not given to file the bill of foreclosure, — the mortgaged premises being at the time in the possession of a receiver appointed in a former suit in the same court, — if, under any circumstances, available, will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared, answered it, and cross-examined the witnesses of the complainant. *Jerome* v. *McCarter*, 734.

36. In chancery suits, adverse rights as between co-defendants may be determined; and a party who had a hearing and an opportunity to assert his rights will be bound by the decree, so far as it affects them. *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 741.

37. Where the judgment of the highest court of a State is here for re-examination, the Federal question, which, it is claimed, arises in the record, will be considered here as it comes from that court. Where, therefore, the point there arising was whether the evidence in the record sustained a finding of fact upon which the judgment of an inferior court had been entered, and the appellate court was permitted by its rules to set aside the judgment as against the weight of evidence only where there was no evidence to support it, or such an absence of evidence that it might be presumed to have been given through the influence of prejudice, passion, or favor, this court will not, upon a question of preponderance of testimony alone, reverse the judgment of the latter court. *So held*, where the question below was, whether a party, when he purchased property, had reasonable cause to believe that his vendor was insolvent, and was making the sale in fraud of the bankrupt law. *Melendy* v. *Rice*, 796.

PRESCRIPTION.

1. Although, in Louisiana, informalities which occur in a sheriff's proceedings under execution may, if taken advantage of in due time, be good ground for annulling a sale made by him, yet, if he, being thereunto authorized, sells the land, and executes a deed therefor, to a *bona fide* purchaser, the latter, in an action against him to recover the land, commenced after five years from the time he entered into possession, can set up the statutory prescription. *Pike* v. *Evans*, 6.

2. The failure of the sheriff to actually seize the property is cured by the possession of such a purchaser for five years. *Id.*

3. Under the laws of Louisiana, a deed of property from a person having authority to sell is regarded as a just title for the purpose of prescription. *Id.*

PRESUMPTION. See *Deed; Jurisdiction*, 6; *Negotiable Instruments*, 11; *Mechanics' Liens*, 2; *Husband and Wife*, 1.

PRIOR USE. See *Letters-Patent*, 1.

PRIVATE PROPERTY, DEPRIVATION OF. See *Constitutional Law*, 1.

PRIVILEGED COMMUNICATIONS. See *Evidence*, 1.

PRIVITY. See *Estoppel*, 13; *Equity*, 10.

PROPERTY, REGULATION OF, WHEN THE PUBLIC HAS AN INTEREST IN ITS USE.

1. Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property. *Munn* v. *Illinois*, 113.
2. It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and, in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. *Id.*
3. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use. *Id.*
4. The limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one. *Id.*
5. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. *Peik* v. *Chicago & North-Western Railway Co.*, 164.

PUBLIC POLICY. See *Bankruptcy*, 2.

RAILROAD COMPANIES, LEGISLATIVE CONTROL OF THEIR RATES OF FARE AND FREIGHT.

1. Railroad companies are carriers for hire. Engaged in a public employment affecting the public interest, they are, unless protected by their charters, subject to legislative control as to their rates of fare and freight. *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 155.
2. The Burlington and Missouri River Railroad Company has, within the scope of the authority conferred by its charter, and subject to the limitations thereby imposed, the power of a natural person to make contracts in reference to its business. Like such person, it, or its assignee, the plaintiff in error, is, under the same circumstances, subject at all times to such laws as the general assembly of the State may from time to time enact. *Id.*
3. A power of government which actually exists is not lost by non-user. The fact, therefore, that the power of regulating the maximum rates

RAILROAD COMPANIES, LEGISLATIVE CONTROL OF THEIR RATES OF FARE AND FREIGHT (*continued*).

of fare and freight was not exercised for more than twenty years after the incorporation of that company is unimportant. Nor does it affect the case, that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the stipulated rent. It could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the State of the same powers of regulation which might have been exercised over the company itself. *Id.*

REAL PROPERTY, POWER OF THE STATES TO REGULATE THE TENURE OF, AND THE MODE OF TRANSFERRING IT. See *Constitutional Law*, 9.

REASONABLE COMPENSATION. See *Common Carrier*, 1, 2; *Constitutional Law*, 5, 6; *Property, Regulation of, when the Public has an Interest in its Use*, 1–5.

RECEIVER. See *Appeal*, 4; *Practice*, 33.

REDEMPTION OF PROPERTY SOLD FOR TAXES. See *Sale for Taxes.*

REMOVAL OF CAUSES FROM STATE COURTS. See *Jurisdiction*, 2; *Practice*, 2.

A suit pending in an appellate State court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States. *Lowe* v. *Williams*, 650.

REVISED STATUTES OF THE UNITED STATES.

The following section referred to and explained:—

Sect. 1007. See *Supersedeas.*

REVISED STATUTES RELATING TO THE DISTRICT OF COLUMBIA. See *Husband and Wife*, 2.

RIGHTS OF PROPERTY, AND TO A COMPENSATION FOR ITS USE.

Rights of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. *Munn* v. *Illinois*, 113.

RIPARIAN PROPRIETORS.

1. In Iowa, it is held, conformably to the true rule on that subject, that the bed of the Mississippi River and its banks to high-water mark

RIPARIAN PROPRIETORS (*continued*).
belong to the State, and that the title of the riparian proprietor extends only to that line. *Barney* v. *Keokuk*, 324.
2. This rule applies as well where the land was granted to bound upon the river generally (as in the case of the Half-breed Sac and Fox reservation), as where it was granted according to surveys run along the bank by a meandering line. Hence it applies in the city of Keokuk, which is on that reservation. *Id.*
3. The public authorities, therefore, have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high water, and make other improvements thereon, necessary to navigation, or public passage by railways or otherwise, without the consent of the adjacent proprietor, and without making him compensation. *Id.*

SALE FOR TAXES. See *Taxation*.
Certain lands in Michigan, sold for taxes, were, for want of other purchasers, bid in by the State. Before the sale became absolute, the owner of the property, having a complete title thereto at the time the sale was made, purchased the State bids. *Held*, 1. That a redemption of the property from the sale was practically effected by the purchase. 2. That the ownership of the State's lien and of the title to the lands being thus united in the same person, the lien was merged in the title. 3. That tax-deeds, subsequently executed to the owner by the State, were only evidence that the taxes were satisfied, the lien of the State discharged, and the estate restored from the sale: they transferred no new title to the grantee. *Gould* v. *Day*, 405.

SPECIFIC PERFORMANCE. See *Equity*, 1.

STATUTE OF LIMITATIONS. See *Ejectment*, 2–4; *Equity*, 10; *Presumption*, 1–3.

STATUTES.
The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. *Munn* v. *Illinois*, 113.

STATUTES OF THE UNITED STATES. See *Revised Statutes of the United States*.
The following, among others, referred to, commented on, and explained: —
1825. March 3. See *Taxation*, 1.
1850. Sept. 27. See *Equity*, 1.
1862. July 17. See *Confiscation*.
1865. Feb. 16. See *Confiscation*.
1864. June 30. See *Internal Revenue*, 2.
1865. March 3. See *Ejectment*, 4.
1866. May 9. See *Court of Claims*, 2.
1866. July 13. See *Distilled Spirits*.

STATUTES OF THE UNITED STATES (*continued*).
1866. July 13. See *Internal Revenue*, 2.
1867. Feb. 22. See *Landlord and Tenant*, 6.
1868. June 25. See *Eight-Hour Law*, 1.
1869. March 3. See *Officers of the Army*, 1.
1870. April 15. See *Chorpenning Claim*.
1870. June 1. See *Ejectment*, 1.
1871. March 3. See *Chorpenning Claim*.
1872. June 1. See *Centennial Board of Finance*.
1875. Feb. 18. See *Supersedeas*.
1875. March 3. See *Jurisdiction*, 1.
1876. Feb. 16. See *Centennial Board of Finance*.

STATUTORY LIEN.
A statutory lien attaching to personal chattels, although no possession of them be delivered, has the same operation and efficacy as existed at common law, where the possession accompanied and followed the deed creating the lien. *Beall* v. *White*, 382.

STIPULATIONS BETWEEN COUNSEL. See *Practice*, 18.

STREETS. See *Iowa*, 1.
There is no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. *Barney* v. *Keokuk*, 324.

SUCCESSION TAX. *See Internal Revenue*, 1.

SUPERSEDEAS. See *Practice*, 32, 33.
Sect. 1007 of the Revised Statutes, which, as amended by the act of Feb. 18, 1875 (18 Stat. part 3, p. 316), provides that, where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States. *Doyle* v. *Wisconsin*, 50.

SUPREME COURT OF THE DISTRICT OF COLUMBIA. See *Letters-Patent*, 21.

SURETY.
A surety, who holds several securities by way of indemnity, may resort to either of them for payment. *Muller* v. *Dows*, 444.

SURRENDER OF AN ESTATE. See *Landlord and Tenant*, 7, 8.

SURVEY OF HATCHES OF SEA-GOING VESSELS. See *Commerce*, 2.

TAXATION. See *Franchises, Forfeiture of; Mineral Lands*, 1–3; *National Banks*, 1, 2; *Sale for Taxes*.
1. The canal and other works of the Chesapeake and Ohio Canal Company, situate in the District of Columbia, having, by an act of

TAXATION (*continued*).

Congress of March 3, 1825 (4 Stat. 101), been exempted from taxation, a sale in 1864 of any part thereof, on account of taxes alleged to be due thereon, was void. *Mackall* v. *Chesapeake & Ohio Canal Co.*, 308.

2. A corporation whose business is confined to the investment of its capital in bonds secured by mortgage on real estate, and to the negotiation, sale, and guaranty of them, is not a bank or a banker within the meaning of sect. 3407 of the Revised Statutes, and is not liable to be taxed as such. *Selden* v. *Equitable Trust Co.*, 419.

3. The charter of the Chesapeake and Ohio Railroad Company does not exempt from taxation that portion of the road of the company between Richmond and Covington. *Chesapeake & Ohio Railroad Co.* v. *Virginia*, 718.

4. A railroad corporation, formed, under an act of the legislature of Virginia, by the consolidation of existing companies, and "vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so. *Id.*

TIDE-WATERS. See *Commerce*, 3–7; *Constitutional Law*, 12; *Fisheries*.

TIME, COMPUTATION OF. See *Bankruptcy*, 4.

TONNAGE, DUTY OF. See *Commerce*, 1.

TRIAL BY JURY. See *Jurisdiction*, 3.

TRUSTS.

1. A trust, created in order to give a married woman the separate and exclusive use of land, free from the control of her husband, will be sustained; by converting it into a legal estate, its purpose would be defeated, as, by virtue of his marital rights, the land would be placed under his control. *So held*, in regard to the effect of certain conveyances of land in New York, set out in the opinion of the court, which were executed in 1827 and 1828 to Michael Werckmeister by Stephen Jumel, upon certain trusts which limited a life-estate to the separate use of Eliza Brown Jumel, his wife, with a general power of appointment during her lifetime, and, on failure to make such appointment, to her heirs in fee-simple. *Bowen* v. *Chase*, 812.

2. After the date of those conveyances, the said Eliza, by deed, bearing date Nov. 21, 1828, duly executed, as required by the trust, made an appointment of the land, in the following words, to wit: "Now I, the said Eliza Brown Jumel, do hereby direct, order, limit, and appoint that, immediately after my demise, the said Michael Werck-

TRUSTS (*continued*).

meister, or his heirs, convey all and singular the said above-described premises to such person or persons, and to such uses and purposes, as I, the said Eliza Brown Jumel, shall, by my last will and testament, under my hand, and executed in the presence of two or more witnesses, designate and appoint, and, for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon, during his said natural life, of six hundred dollars; payable to Mary Jumel Bownes, and, after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes and her heirs in fee." *Held*, that, after the termination of said Eliza's separate interest for life, the appointment limited the equitable estate in the land, and vested in said Stephen and Mary immediate interests, although they did not take effect in possession until the death of said Eliza, and were subject to be defeated by the exercise of her reserved power of disposing of the land by her last will and testament. *Id.*

3. The effect of the chapter of the Revised Statutes of New York, touching uses and trusts (1 Rev. Stat. 727), which went into operation Jan. 1, 1830, upon the estates created by the trust and appointment, considered; but, in the view taken by the court of this case, it is not material whether they were, by the statute, turned into legal estates, or remained, as they were originally, merely equitable in their nature. *Id.*

4. The appointment in favor of said Mary was a voluntary one; and as said Eliza had a power to lease and a power to convey, assure, and dispose, which latter power manifestly includes a power to sell, not only by the terms used, but, in this trust, by the direction as to the disposition of the purchase-money "in case of an absolute sale," sales of the land to actual purchasers for a valuable consideration were effectual, and superseded the prior appointment in favor of said Mary. It was not necessary to their validity that said Eliza, in making that appointment, should have expressly reserved a power of revocation. *Id.*

5. Where the subsequent appointments were voluntary, or intended merely as means of restoring the property to its original trusts, or of revesting it absolutely in said Eliza, the interest of said Mary, whether it be regarded as a legal or an equitable estate, would not be thereby displaced. *Id.*

6. Certain appointments, subsequent to that in favor of said Mary made by said Eliza, who survived her husband and died intestate in 1865, declared to be voluntary and for the purpose of revesting the title in said Eliza. Bowen, claiming to be her sole heir-at-law, has brought sundry actions of ejectment to recover the land. Said Mary died intestate in 1848. The appellees are in possession of the land, and

TRUSTS (*continued*).
claim, as her heirs-at-law, under the appointment in her favor. *Held*, that they are entitled to relief in a court of equity. If their estate is to be regarded as still an equitable one, their right to such relief is undoubted, no matter where, or in whom, the legal estate may be. If, by virtue of the statute, their equitable estate was converted into a legal estate, they have good cause to come into that court for the purpose of removing the cloud upon their title created by the subsequent voluntary appointments and conveyances. *Id.*

UNITED STATES, DEVISE TO. See *Devise.*

UNITED STATES, PRIORITY OF, TO PAYMENT. See *Centennial Board of Finance.*

VERDICT. See *Practice*, 23, 25.

VERMONT. See *National Banks*, 4.

VIRGINIA. See *Constitutional Law*, 12; *Taxation*, 4.

WAGER POLICY. See *Life Insurance*, 2–4.

WAIVER. See *Landlord and Tenant*, 5.
The court holds that there was no waiver by the Chicago, Rock Island, and Pacific Railroad Company of its right to foreclose the mortgage, executed by the Chicago and South-western Railroad Company upon its road and franchises. *Muller* v. *Dows*, 444.

WAREHOUSES. See *Constitutional Law*, 4.
Where warehouses for storing grain are situated and their business is carried on exclusively within a State, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in inter-state, as well as in State, commerce; and, until Congress acts in reference to their inter-state relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction. *Munn* v. *Illinois*, 113.

WARRANTY. See *Contracts*, 1, 2.

WASTE. See *Landlord and Tenant*, 1, 8.

WINONA AND ST. PETER RAILROAD COMPANY. See *Constitutional Law*, 8.

WISCONSIN. See *Common Carrier*, 1; *Constitutional Law*, 6, 7, 15; *Corporations*, 2; *Judicial Comity*, 2, 8.

WITNESS. See *Negotiable Instrument*, 7.

WRIT OF ERROR. See *Practice*, 27.
A., having a decree against the city of Memphis for the payment of money, obtained, by judgment rendered March 30, 1875, a *mandamus*, directing her, for the payment of the decree, to levy a tax upon

WRIT OF ERROR (*continued*).

all the taxable property of the city. She thereupon passed an ordinance levying a special tax of fifty-four cents "on the $100 worth of property." Under the laws of the State, taxable real and personal property, other than merchants' capital, is embraced in one tax-list, and merchants' capital in another. A., finding that such capital was not subjected to the special tax, although it was to that levied for all other purposes, and that the required sum would not be raised, moved for a further peremptory *mandamus*, requiring such capital, as it was assessed for other purposes in the year 1875, to be included in the property to be taxed for his benefit. Such *mandamus* was directed by judgment March 2, 1876. On the 20th of the following May, the city moved to set aside the latter judgment; but the court refused to grant the motion, and re-entered, on that day, the judgment as the final judgment in the premises. Thereupon the city, within due time, sued out a writ of error, and gave the necessary bond. *Held*, 1. That the court had the right to set aside the judgment of March 2, during the term at which it was rendered, and to re-enter it as of the date when the motion to set it aside was made. 2. That the writ of error was properly sued out on the re-entered judgment, and is a *supersedeas*. *Memphis* v. *Brown*, 715.

Cambridge: Press of John Wilson & Son.